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No. _____

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In The

# Supreme Court of the United States

October Term, 1988

SUPREME BEEF PROCESSORS, INC.,

*Petitioner,*

v.

ROBERT YAQUINTO, JR.,
TRUSTEE FOR CARAVAN REFRIGERATED CARGO, INC.,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

*– AND APPENDICES –*

JOHN W. BRYANT
*Counsel of Record*
NEILL T. RIDDELL
EAMES, WILCOX, MASTEJ AND BRYANT
900 Guardian Building
Detroit, Michigan 48226
Telephone: (313) 963-3750
*Counsel for Petitioner*

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Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

## QUESTIONS PRESENTED

I.

WHETHER THE INTERSTATE COMMERCE COMMISSION, IN EXERCISING ITS PRIMARY JURISDICTION UNDER 49 USC § 10701(a) OVER THE LAWFULNESS OF MOTOR COMMON CARRIER PRACTICES IN ACCORDANCE WITH REGULATORY CHANGES AFTER THE MOTOR CARRIER ACT OF 1980, MAY DETERMINE THAT IT IS AN UNREASONABLE PRACTICE FOR A CARRIER TO (1) FALSELY REPRESENT TO A SHIPPER ON A CONTINUING BASIS THAT SPECIFIC RATES ARE LEGALLY EFFECTIVE, (2) ISSUE BILLINGS AND ACCEPT PAYMENTS BASED UPON SUCH REPRESENTATIONS, AND (3), AFTER CEASING OPERATIONS, SEEK TO COLLECT HIGHER CHARGES BASED UPON THE CARRIER'S OWN FAILURE TO FILE THE ORIGINALLY QUOTED RATES WITH THE COMMISSION.

II.

WHETHER A SHIPPER WHICH RAISES THE DEFENSE OF UNREASONABLE PRACTICES IN A MOTOR CARRIER ACTION TO COLLECT FREIGHT CHARGES IS REQUIRED TO PAY THE CHARGES TO THE CARRIER PRIOR TO CONSIDERATION OF ITS DEFENSE BY THE INTERSTATE COMMERCE COMMISSION.

III.

WHETHER THE STATUTORILY PROTECTED PUBLIC INTEREST IN SECURING LOWER RATE SCHEDULES FOR GOVERNMENT TRANSPORTATION REQUIRES ALLOWANCE OF A DELAYED ASSERTION OF THAT INTEREST IN PROCEEDINGS BEFORE UNITED STATES DISTRICT COURTS.

## LIST OF PARTIES

The caption of the case in this Court contains the names of all parties in the proceeding before the United States Court of Appeals for the Fifth Circuit. Petitioner has no parent companies, subsidiaries (other than wholly owned subsidiaries) or affiliates.

## TABLE OF CONTENTS

PAGE NO.

QUESTIONS PRESENTED ..... i

LIST OF PARTIES ..... ii

TABLE OF AUTHORITIES ..... v

OPINIONS BELOW ..... 1

JURISDICTION ..... 2

STATUTES INVOLVED ..... 2

STATEMENT OF THE CASE ..... 3

REASONS FOR GRANTING THE WRIT ..... 8

I. THE ICC HAS DISCRETION TO DETERMINE THAT THE CARRIER CONDUCT ALLEGED IN THIS CASE CONSTITUTES AN UNREASONABLE PRACTICE PROHIBITED BY 49 USC § 10701(a). ..... 10

II. A SHIPPER WHICH RAISES THE DEFENSE OF UNREASONABLE PRACTICES IN A MOTOR CARRIER ACTION TO COLLECT FREIGHT CHARGES IS NOT REQUIRED TO PAY THE CHARGES TO THE CARRIER PRIOR TO CONSIDERATION OF ITS DEFENSE BY THE ICC. 19

III. THE IMPORTANT FEDERAL INTEREST IN SECURING LOWER RATE SCHEDULES FOR GOVERNMENT TRAFFIC REQUIRES COURTS TO ACCEPT DELAYED ASSERTION OF SUCH INTERESTS IN COURT PROCEEDINGS. ... 22

CONCLUSION ..... 24

APPENDICES:

*Appendix A* — ORDER DENYING REHEARING – United States Court of Appeals for the Fifth Circuit [*March 1, 1989*] .. A-1

PAGE NO.

*Appendix B* — OPINION – United States Court of Appeals for the Fifth Circuit [*February 2, 1989*] ..... B-1

*Appendix C* — ORDER DENYING RECONSIDERATION – United States District Court, Northern District of Texas, Dallas Division [*March 4, 1988*] .. C-1

*Appendix D* — MEMORANDUM OPINION AND ORDER – United States District Court, Northern District of Texas, Dallas Division [*January 20, 1988*] D-1

*Appendix E* — MEMORANDUM OPINION AND ORDER – United States District Court, Northern District of Texas, Dallas Division [*November 13, 1987*] ..... E-1

*Appendix F* — ORDER DENYING TRANSFER TO ICC – United States Bankruptcy Court, Northern District of Texas, Dallas Division [*July 11, 1987*] ... F-1

*Appendix G* — LIST OF CASES Confirming Authority of ICC to Determine Issues of Unreasonableness of Motor Carrier Practices Involving Misrepresentation of Rates ..... G-1

*Appendix H* — LIST OF CASES Denying Authority of ICC over Unreasonable Practice Issues Involving Misrepresentation of Rates ..... H-1

## TABLE OF AUTHORITIES

PAGE NO[S].

**COURT CASES:**

*Adams* v. *Mills*, 286 U.S. 397 (1932) ..... 12

*American Trucking Association* v. *Atchison T. & S. F. Ry. Co.*, 387 U.S. 397 (1967) ..... 17

*Arizona Grocery Co.* v. *Atchison T. & S. F. Ry. Co.*, 284 U.S. 370 (1932) ..... 14

*Baggett Transportation Co.* v. *United States*, 670 F2d 1011 (Cl. Ct. 1982) ..... 23

*Bud Antle, Inc.* v. *United States*, 593 F2d 865 (9th Cir. 1979) ..... 12

*Burlington Northern* v. *U.S.*, 459 U.S. 131 (1982) 21, 22

*Chevron U.S.A., Inc.* v. *Natural Resource Defense Council*, 467 U.S. 837 (1984) ..... 17

*Cleveland Cliffs Iron Co.* v. *ICC*, 664 F2d 568 (6th Cir. 1981) ..... 15

*Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285 (1922) ..... 20

*Hewitt-Robins, Inc.* v. *Eastern Freightways, Inc.*, 371 U.S. 84 (1962) ..... 12

*INF Ltd.* v. *Spectro Alloys Corp.*, 690 F. Supp. 808 (D. Minn. 1988) ..... 13

*In Re Penn Central Transportation Co.*, 477 F2d 885 (3rd Cir. 1973) ..... 21

*Interstate Commerce Commission* v. *Illinois Central Railroad Co.*, 215 U.S. 452 (1910) .... 11

*Jetco, Inc.* v. *U.S.*, 11 Cl. Ct. 837 (1987) ..... 7, 23

PAGE NO[S].

*Keller Industries, Inc.* v. *U.S.*, 449 F2d 163 (9th Cir. 1971) ..... 20

*Keogh* v. *Chicago & Northwestern R. Co.*, 260 U.S. 156 (1922) ..... 18

*Louisville & Nashville Ry.* v. *Maxwell*, 237 U.S. 94 (1915) ..... 13

*McCrea* v. *Harris County Houston Ship Channel Nav. Dist.*, 423 F2d 605 (5th Cir. 1970) ..... 24

*Middlewest Motor Freight Bureau* v. *U.S.*, 433 F2d 212 (8th Cir. 1970) ..... 14

*Seaboard System R.R.* v. *United States*, 794 F2d 635 (11th Cir. 1986) ..... 7, 9, 11, 17, 20

*Southern Pacific Transp. Co.* v. *City of San Antonio*, 748 F2d 266 (5th Cir. 1984) ... 7, 21, 22

*Square D Co.* v. *Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986) ..... 18, 19

*United States* v. *Western Pacific Railroad*, 352 U.S. 59 (1956) ..... 9, 20, 22

*Western Transportation Co.* v. *Wilson & Co.*, 682 F2d 1227 (7th Cir. 1982) ..... 9, 16, 20, 24

**INTERSTATE COMMERCE COMMISSION DECISIONS:**

*Albers Bros Milling Co.* v. *Great Northern Ry. Co.*, 256 ICC 491 (1943) ..... 12

*Annual Volume Rates on Coal — Flint Creek, AR*, 364 ICC 753 (1981), *affd. sub nom Burlington Northern, Inc.* v. *United States*, 679 F2d 915 (D.C. Cir. 1982) ..... 15

*Armour & Co.* v. *Northern Pacific Ry. Co.*, 209 ICC 277 (1935) ..... 16

PAGE NO[S].

*Bradford Coal Co.* v. *Baltimore & O. R. Co.*, 305 ICC 761 (1959) ..... 21

*Bushman Dock & Term.* v. *Chesapeake & O. Ry. Co.*, 302 ICC 183 (1950) ..... 20

*Carson Iron & Steel Co.* v. *Atlantic & N. C. R. Co.*, 237 ICC 724 (1940) ..... 16

*C. A. Wagner Construction Co.* v. *Chicago & N. W. Ry. Co.*, 208 ICC 767 (1935) ..... 16

*Coal Colstrip, Kuehn and Decker, MT, To Superior WI*, 364 ICC 152 (1980) ..... 15

*Ex Parte* No. MC-177, *National Industrial Transportation League — Petition To Initiate Rule making on Negotiated Motor Common Carrier Rates* ..... 4, 5, 8, 10, 12, 14, 16, 20

*Ex Parte* No. 358-F, *Change of Policy, Rail Road Contract Rates*, 45 Fed. Reg. 21719 (April 2, 1980, reported in *Cleveland Cliffs Iron Co.* v. *ICC*, 644 F2d 568 (6th Cir. 1981) ..... 15

*Foremost Food & Chemical Co.* v. *Alton & S. R.*, 318 ICC 35 (1962) ..... 21

*Hawkins & Son* v. *Director General*, 80 ICC 255 (1923) ..... 12

*Ideal Cement Co.* v. *Atchison, T. & S. F.*, 280 ICC 55 (1951) ..... 15

*Increased Freight Rates, E. W. & S Territories, 1956*, 300 ICC 633 (1957) ..... 24

*Interoceanic Commodities Corp.* v. *Chicago G. W. Ry. Co.*, 309 ICC 710 (1960) ..... 20

*Interpretation of Govt. Rate Tariff — Eastern Central*, 323 ICC 347 (1964) ..... 23

PAGE NO[S].

*In the Matter of Released Rates*, 13 ICC 550 (1908) ..... 12

*Iowa Beef Processors, Inc.* v. *Western Transportation*, ICC Docket No. 37521 (not printed; September 14, 1981) ..... 16

*Lawson Concrete Co.* v. *C. & N. W. Transp. Co.*, 367 ICC 109 (1982) ..... 21

*National Wool Growers Association* v. *Union Pacific R. Co.*, 49 ICC 55 (1918) ..... 12

*New England Box Co.* v. *Boston & M. R.*, 305 ICC 133 (1958) ..... 21

*Piedmont Mills, Inc.* v. *Norfolk & W. R. Co.*, 296 ICC 481 (1955) ..... 15

*Postal Telegraph Cable Co.* v. *W. U. Telegraph Co.*, 59 ICC 512 (1920) ..... 11

*Sheboygan Fruit Box Co.* v. *Chicago & N. W. Ry. Co.*, 214 ICC 157 (1936) ..... 16

*Standard Brands, Inc.* v. *Central R. Co. of N. J.*, 350 ICC 555 (1974) ..... 16

*Stopping Of Cars in Transit to Complete Loading*, 36 ICC 130 (1915) ..... 11

*Sutherland Paper Co.* v. *Ann Arbor R. Co.*, 215 ICC 344 (1936) ..... 16

*Thermofil, Inc.* v. *Jones Transfer Co.*, 355 ICC 828 (1975) ..... 16

*Unit Train Rates — Coal — Burlington Northern, Inc.*, 364 ICC 186 (1980), *affd. sub nom Iowa Power and Light Co.* v. *Burlington Northern, Inc.*, 647 F2d 796 (8th Cir. 1981) ..... 15

PAGE NO[S].

**STATUTORY PROVISIONS AND OTHER AUTHORITIES:**

28 USC § 1254(1) ..... 2

28 USC § 1331 ..... 3

28 USC § 1334 ..... 3

49 USC § 10701(a) ..... 1, 2, 6, 8, 10, 11, 12, 20

49 USC § 10721(b)(1) ..... 6, 22, 24

49 USC § 10761 ..... 7, 14, 16, 17

49 USC § 10762 ..... 3

Senate Report No. 410, U.S. Code Cong. and Admin. News, 85th Congress, First Session (1957), p. 1782 ..... 24

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SUPREME BEEF PROCESSORS, INC.,

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v.

ROBERT YAQUINTO, JR.,
TRUSTEE FOR CARAVAN REFRIGERATED CARGO, INC.,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case affirming a grant of summary judgment in Respondent's action to collect motor carrier freight charges from Petitioner and denying Petitioner's request that the case be referred to the Interstate Commerce Commission for a determination of whether collection of such charges would constitute an unreasonable practice prohibited by 49 USC § 10701(a).

### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 864 F2d 388 and is reprinted as Appendix B.

The Memorandum Opinion and Order of the United States District Court for the Northern District of Texas (Buchmeyer, D.J.) granting summary judgment for

Respondent has not been reported and is reprinted as Appendix D. Also unreported and attached as appendices are the District Court's subsequent Order Denying Reconsideration of summary judgment (Appendix C), its prior Memorandum Opinion and Order Denying Petitioner's motion for referral to the Interstate Commerce Commission (Appendix E), and an Order of the United States Bankruptcy Court for the Northern District of Texas (McGuire, B.J.) denying Petitioner's Motion to Transfer proceedings to the Interstate Commerce Commission. (Appendix F).

## JURISDICTION

The opinion and judgment of the Fifth Circuit was entered on February 2, 1989. A timely petition for rehearing was denied on March 1, 1989. (Appendix A). The jurisdiction of this Court is invoked under 28 USC § 1254(1).

## STATUTES INVOLVED

*49 USC § 10701* *Standards for Rates, Classifications, Through Routes, Rules, and Practices*

(a) A rate (other than a rail rate), classification, rule or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under Chapter 105 of this title must be reasonable. * * *

## STATEMENT OF THE CASE

This case originated upon the filing by Respondent of an adversary complaint in the United States Bankruptcy Court for the Northern District of Texas on August 29, 1985. The complaint sought to collect motor carrier freight charges in addition to those previously billed and paid on 218 motor carrier shipments transported between January 7, 1983, and March 30, 1984. Jurisdiction was invoked pursuant to 28 USC § 1334 (cases or proceedings arising under, arising in, or related to cases under Title 11, USC). Payment of the additional charges in question was alleged to be required by 49 USC § 10762, thus presenting a federal question within the meaning of 28 USC § 1331 (general federal question). Respondent filed the complaint in his capacity as trustee in bankruptcy for Caravan Refrigerated Cargo, Inc., which had performed the interstate motor common carrier service in question.

Petitioner filed an answer, affirmative defenses, and counterclaim on February 11, 1986, alleging, *inter alia*, that collection of the additional charges would constitute an unreasonable practice prohibited by 49 USC § 10701(a). (Answer and Counterclaim, ¶ 10). Petitioner stated that Caravan had induced Petitioner to use Caravan's services by representing that it could perform services for Petitioner at specified rates and charges. (Answer and Counterclaim, ¶ 8). Petitioner also stated that Caravan had followed a uniform practice of billing Petitioner at the level of charges quoted and agreed to, and of accepting payment from Petitioner based on such billings. (Answer and Counterclaim, ¶¶ 27, 28). Petitioner further stated that it received no indication from Caravan that the rates quoted and billed were not filed with the Interstate Commerce Commission

("ICC") until after Caravan had discontinued its operations. (Answer and Counterclaim, ¶¶ 29, 30).

On April 30, 1986, Petitioner filed a motion for a stay of proceedings in the Bankruptcy Court and consideration of its unreasonable practice defense by the ICC. Uncontroverted affidavits submitted in support of the motion by former officers of Caravan and by an officer of Petitioner demonstrated that (1) Caravan uniformly billed Petitioner at the negotiated level of rates, (2) Petitioner was told by Caravan personnel that all rates charged were lawfully in effect, (3) Petitioner paid all charges as billed, and (4) Caravan had raised no question as to the lawfulness of those charges until after its cessation of operations in bankruptcy. (Affidavits of J. Moore, S. Spiritas, and J. Newbold, April 30, 1986; May 1, 1986; and May 28, 1986). The affidavits also demonstrated that the rates charged by Caravan were not discriminatory, but rather, were similar to rates charged to Petitioner by other competing carriers. (Affidavit of J. Moore, April 30, 1986, p. 2). An affidavit of one of the former Caravan officers conceded that Caravan's practice of misrepresenting that lower rates were in effect was a part of a specific effort by Caravan to retain Petitioner's business in the face of competition from other carriers, even when Caravan was not able to make the rate filings alleged to be necessary to comply with ICC tariff filing requirements. (Affidavit of J. Newbold, pp. 2-3).

Petitioner's motion referred extensively to a then-pending proceeding before the ICC in which a major national transportation organization, The National Industrial Transportation League, had sought promulgation of a rule by the ICC declaring assessment of published rates to be unreasonable under circumstances similar to those alleged by Petitioner. *Ex Parte* No. MC-177, *National Industrial Transportation League* —

*Petition To Initiate Rulemaking on Negotiated Motor Common Carrier Rates* ("*Negotiated Rates*"). On May 8, 1986, the ICC announced that it intended to issue a policy statement in lieu of a formal rule concerning this issue. As a result of this announcement, Petitioner and Caravan agreed to suspend further proceedings before the Bankruptcy Court until the ICC issued a written decision setting forth its conclusions.

On October 29, 1986, the ICC's written decision in *Negotiated Rates* issued at 3 ICC 2d 99. The ICC stated that Congress in the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, had amended the National Transportation Policy to require the ICC to promote competitive, innovative, and individualized price and service options to meet changing market demand. Pub. L. No. 96-296 § 4; 49 USC § 10101(a)(7); *Negotiated Rates, supra,* at 3 ICC 2d 105. The ICC noted that passage of the Motor Carrier Act had resulted in such changes as eliminating prohibitions against rates applicable to only one shipper, allowing common carrier rates to be filed on short notice, and permitting common carriers to perform service as contract carriers as well. *Id.* at 105, 106.

Under these circumstances, the ICC stated that shippers and carriers were called upon to negotiate hundreds or even thousands of individual motor common carrier rates daily. *Id.* at 105. Such increased competitive activity made it extremely difficult for shippers to determine prior to movement whether agreed rates were actually on file. It also placed greater importance on the accuracy of carriers' representations concerning their rate levels. *Id.* at 105, 106.

Because of these circumstances, the ICC stated that, under appropriate circumstances, it would find that carrier attempts to collect their published charges

would be found to constitute unreasonable practices in violation of 49 USC § 10701(a) where the carrier had negotiated a lower rate with the shipper and had indicated that the negotiated rate would be the one charged and filed as a tariff. *Id.* at 107. The ICC further indicated that it would exercise its unreasonable practice jurisdiction upon referral from courts in which carrier actions to collect charges were pending. *Id.* at 106-7.

On July 11, 1987, the Bankruptcy Court issued an order denying Petitioner's motion for referral. (Appendix F). Simultaneously, however, the Bankruptcy Court recommended transfer of the entire proceeding to the United States District Court. Petitioner reasserted its motion for referral before the District Court. That motion, however, was denied by the District Court on November 13, 1987. (Appendix E). The District Court held that referral of reasonableness issues was not mandatory and that it felt qualified to render a decision without a prior ICC determination. Petitioner and Respondent then filed cross-motions for summary judgment, with Respondent also seeking dismissal of Petitioner's counterclaim. The District Court on January 20, 1988, granted Respondent's motion for summary judgment as to all issues. (Appendix D).

On January 28, 1988, Petitioner moved for reconsideration of the District Court's order. In part, Petitioner sought reconsideration based on the fact that a number of the underlying shipments were performed on behalf of government agencies.[1] Under 49 USC § 10721(b)(1), such shipments are exempt from rate filing requirements so as to be exempt from any tariff collection

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[1] Approximately fifty percent of the shipments at issue fall into this category. Petitioner paid the freight charges on these shipments and passed the charges through to the government without change.

obligations under 49 USC § 10761. *Jetco, Inc.* v. *U.S.*, 11 Cl. Ct. 837 (1987). The District Court denied the motion for reconsideration. (Appendix C). Petitioner then filed its appeal to the United States Court of Appeals for the Fifth Circuit. Following briefing and argument, the Fifth Circuit issued its decision affirming summary judgment on February 2, 1989. (Appendix B).

In affirming the District Court, the Fifth Circuit's apparent conclusion was that carrier practices of the type both alleged by Petitioner on the record below and described by the ICC in *Negotiated Rates* cannot constitute a defense to a motor carrier action to collect published freight charges. The Court stated that allowing such a defense to be asserted and referred to the ICC for decision would create an exception to the requirement of 49 USC § 10761 that carriers must collect their filed tariff charges. (B-9). The Court distinguished the instant case from the opinion of the Eleventh Circuit in *Seaboard System R.R.* v. *United States*, 794 F2d 635 (11th Cir. 1986). While conceding that *Seaboard* had upheld an ICC ruling finding that a carrier had engaged in an unreasonable practice by misquoting rates to a shipper, the Fifth Circuit stated that this defense was available only where the carrier's misquotation involved an unclear or ambiguous tariff. (B-11). The Fifth Circuit also stated that affirmance of the District Court was required by its decision in *Southern Pacific Transp. Co.* v. *City of San Antonio*, 748 F2d 266 (5th Cir. 1984). It stated that *Southern Pacific* held that a carrier is entitled to seek payment of charges in its tariff in Court even while the reasonableness of those tariffs is challenged before the ICC (B-8) and that such a holding required rejection of Petitioner's unreasonable practice defense. (B-9).

The Fifth Circuit also rejected Petitioner's contention that application of published tariffs was not required on its shipments for the government. It did not address the District Court's ruling on the merits of this contention. Rather, it held that Petitioner should have been barred from raising this argument before the District Court on reconsideration because it had not raised the argument prior to summary judgment. (B-13). A timely-filed petition for rehearing was denied by the Fifth Circuit on March 1, 1989.

## REASONS FOR GRANTING THE WRIT

This case presents the Court with issues which are the focus of litigation in literally hundreds of pending federal and state court proceedings involving shippers using the nation's interstate motor common carrier system. As a by-product of increased competitiveness in this system fostered by Congress in the Motor Carrier Act of 1980, shippers have been faced with an increasing pattern of willful understatement by motor common carriers of their legally effective charges. These misstatements have been buttressed by lengthy periods of billing and acceptance of payment by carriers at these understated levels. At a later date, almost always after the carrier has ceased operations, a collection agency purporting to act for the carrier or its bankruptcy trustee brings an action to collect "undercharges." This action is based upon the higher rates which had remained legally in effect because of the carrier's failure to file the lower rates which it had promised the shippers.

Decisions of this Court and the Courts of Appeal have long upheld the power of the ICC to declare inequitable, deceptive, or unwarranted carrier rate practices unreasonable under 49 USC § 10701(a). The ICC's *Negotiated Rates* policy statement specifically declared

the intention of the ICC to expand its use of these powers to address rate misrepresentation issues. The opinion of the Fifth Circuit, however, along with decisions of a minority of lower courts, holds that shippers are foreclosed from asserting unreasonableness of such practices as a defense to carrier collection actions.

The Fifth Circuit decision is in direct conflict with the decision of the Eleventh Circuit in *Seaboard System R.R.* v. *United States, supra,* 794 F2d 635. *Seaboard* affirms a decision of the ICC holding that it would be an unreasonable practice for a carrier to collect its published tariff rates where it had misled the shipper as to the applicable tariff rate. *Id.* at 637, 639. The decision is also in direct conflict with the decisions of this Court in *United States* v. *Western Pacific R. Co.,* 352 U.S. 59 (1956) and the Seventh Circuit in *Western Transportation Co.* v. *Wilson & Co.,* 682 F2d 1227 (7th Cir. 1982). Those decisions hold that a shipper may raise unreasonableness as a defense to a carrier collection action without first paying the charges at issue to the carrier.

The decisional conflict before the Court, however, relates not only to the conflict between these cases and the Fifth Circuit opinion below, but also to the conflict extant in the myriad of currently pending cases on this issue. As indicated by the abstract of cases contained in Appendices G & H, litigation involving these same issues currently is pending on appeal in five other circuits.[2] Federal or state courts have granted referral of approximately 150 proceedings involving these issues to

[2] *Appco Paper & Plastic Co.* v. *Oneida Trucking Co.,* No. 88-9057 (2d Cir.) (appeal from decision denying reference to ICC); *Orr* v. *ICC,* No. 89-5108 (6th Cir.) (appeal from the decision affirming unreasonableness finding of ICC); *Zenith Electronics Corp.* v. *Orscheln Brothers Truck Lines,* Nos. 89-1261, 1329, 1330 (7th Cir.) (appeal from decision declining to apply ICC unreasonableness finding); *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.,* No. 88-2267-WM (8th Cir.) (appeal from decision affirming unreasonableness finding of ICC); *Delta Traffic Service* v. *Marine Lumber Co.,* No. 89-35121 (9th Cir.) (appeal from decision affirming unreasonableness finding of ICC).

the ICC for determinations as to the unreasonableness of motor carrier practices under 49 USC § 10701(a). (G-1 – G-9). In approximately 50 cases, however, district courts, bankruptcy courts, or state courts have denied shipper requests for referral of unreasonable practice defenses to the ICC. (H-1 – H-5). In additional cases, district or bankruptcy courts have rejected ICC findings of unreasonable motor carrier practices as non-binding. (H-1 – H-5). The conflict among these decisions is one which only this Court can resolve.

## I.

## THE ICC HAS DISCRETION TO DETERMINE THAT THE CARRIER CONDUCT ALLEGED IN THIS CASE CONSTITUTES AN UNREASONABLE PRACTICE PROHIBITED BY 49 USC § 10701(a).

The fundamental issue for decision by the Court is whether the long-exercised statutory power of the ICC to declare motor carrier rates or their collection unreasonable may be negated by an over-extension of the statutory requirement that carriers initially charge their published rates. The policy announced by the ICC in *Negotiated Rates* and applied in many succeeding cases is an exercise of the long-established statutory powers of the ICC, currently codified at 49 USC § 10701(a), to declare that collection of rates in carrier tariffs may constitute unreasonable practices under appropriate circumstances. Such findings require that related court actions for collection must be dismissed.

Decisions such as that of the Fifth Circuit below ignore this important statutory function of the ICC. Rather, they extend case precedents which bar *courts* from considering misrepresentation, fraud, or prior agreement as defenses to the collection of published charges to bar *the ICC* from considering such factors in

the exercise of its congressionally mandated powers under 49 USC § 10701(a). Such a theory represents a perverse statutory construction which this Court should not countenance. In the words of the Eleventh Circuit, prior to the inception of the present controversy, "the courts [had] never held that the ICC lacks authority to prohibit the unreasonable collection of undercharges." *Seaboard System R.R.* v. *United States, supra,* 794 F2d at 638.

This Court frequently has noted that the powers granted to the ICC to prohibit unreasonable carrier practices are extremely broad. The ICC's recodified statutory powers at 49 USC § 10701(a) are derived from prior statutes affecting both rail and motor carriers. The statute states that the ICC's reasonableness powers extend to "any practice related to transportation or service provided by a carrier". The predecessor to this provision originally enacted by Congress in 1906 emphasized the breadth of these powers even more strongly, applying them to "any regulations or practices whatsoever" of a carrier affecting common carrier rates and charges. *Interstate Commerce Commission* v. *Illinois Central Railroad Co.,* 215 U.S. 452, 475 (1910). The ICC itself has construed its unreasonable practice powers as "broad enough to cover any unreasonable practice of a common carrier" and control "whatever regulations and practices" enter into the application of carrier rates. *Postal Telegraph Cable Co.* v. *W. U. Telegraph Co.,* 59 ICC 512, 516 (1920); *Stopping of Cars in Transit to Complete Loading,* 36 ICC 130, 132 (1915).

The categories of carrier conduct which the ICC has found to constitute unreasonable practices range across the entire spectrum of transportation activities having an impact on the charges ultimately paid by shippers. Very early in its existence, the ICC held that it could be an unreasonable practice for carriers to publish rate

provisions and billing documents which were likely to mislead the shipping public or suggest that rates higher or lower than those actually on file would be charged. *In the Matter of Released Rates,* 13 ICC 550, 562, 564 (1908). The ICC has repeatedly held that the fact that a rate is contained in a published tariff and is found to be reasonable in its own right does not prevent application of that rate from constituting an unreasonable practice in particular circumstances. *National Wool Growers Association* v. *Union Pacific R. Co.*, 49 ICC 55, 58 (1918); *Albers Bros Milling Co.* v. *Great Northern Ry. Co.*, 256 ICC 491, 500 (1943). Both this Court and the ICC have held that shippers injured by unreasonable carrier practices are entitled to recovery of money damages from the carriers involved. *Hewitt-Robins, Inc.* v. *Eastern Freightways, supra,* 371 U.S. 84 (1962); *Adams* v. *Mills,* 286 U.S. 397, 407-8 (1932); *Bud Antle, Inc.* v. *United States,* 593 F2d 865, 875 (9th Cir. 1979); *Albers Bros Milling Co.* v. *Great Northern Ry. Co., supra,* 256 ICC at 500; *Hawkins & Son* v. *Director General,* 80 ICC 225, 227 (1923).

The apparent logic of the Fifth Circuit and the minority of lower courts in declining to recognize the power of the ICC to find that continuing rate misrepresentation constitutes an unreasonable practice is either that (1) the ICC lacks power to find that assessment of a published rate constitutes an unreasonable practice or (2) the practices alleged by petitioner and noted by the ICC in *Negotiated Rates* could never be found to be unreasonable within the meaning of 49 USC § 10701(a). Both of these propositions are patently untenable. From the very onset of regulation, the ICC has exercised its powers to declare carrier rates and practices unreasonable to relieve shippers from their obligation to pay

published carrier charges. This fact is imbedded in the very quotation of Justice Brandeis recited by the Fifth Circuit in support of the primacy of filed rates. (B-5). The full statement of law by Justice Brandeis explaining the interrelation between the ICC's reasonableness powers and the duty of carriers to collect their published charges reads as follows:

> The rate of a carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, *unless it is found by the Commission to be unreasonable.* Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. The rule is undeniably strict, and it may work hardship in some cases, but it embodies the policy which has been adopted by Congress in regulation of interstate commerce in order to prevent unjust discrimination. *Louisville & Nashville Ry.* v. *Maxwell,* 237 U.S. 94, 97 (1915) (Emphasis added).

Significantly, the Fifth Circuit's quotation of this language in its opinion (B-5) *omits* the reference of Justice Brandeis to the power of the ICC to prevent application of a filed rate by finding it to be unreasonable. Similar deletions of this critical phase appear in other decisions of lower courts which cite this quotation as establishing a requirement of immutable adherence to published tariffs. See, e.g., *INF Ltd.* v. *Spectro Alloys Corp.,* 690 F. Supp. 808, 810 (D. Minn. 1988).

These deletions of Justice Brandeis' critical phrase show a fundamental lack of understanding of the numerous court decisions differentiating between the "legal rate" contained in the carrier's tariff, which the carrier is initially required to charge, and the "lawful rate" ultimately established by an ICC decision following a shipper objection that the "legal rate" was unreasonably high. *Arizona Grocery Co.* v. *Atchison T. & S. F. Ry. Co.*, 284 U.S. 370, 384 (1932); *Middlewest Motor Freight Bureau* v. *U.S.*, 433 F2d 212, 238-39 (8th Cir. 1970), *cert. den.* 402 U.S. 999 (1971). It is only the *lawful* rate which the shipper ultimately is required to bear. The Fifth Circuit and other lower courts simply are wrong in their assertion that the "filed tariff doctrine" created by 49 USC § 10761 bars the ICC from finding a tariff or its application to be unreasonable so as to allow a shipper to avoid payment of the charges contained in that tariff.

There similarly is no merit to any argument that the unreasonable practice defenses asserted by Petitioner and described in *Negotiated Rates* must be rejected because of any particular inconsistency with the rate filing requirements of 49 USC § 10761. The fact that the claimed unreasonable practice involves fraud or misrepresentation in description of the carrier's legally effective rates does not constitute a bar to the ICC's exercise of its unreasonable practice jurisdiction. The line of cases which holds that fraud, misrepresentation, or other equitable defenses may not be asserted in carrier actions to collect published rates applies only to those situations where shippers seek to invoke the powers of equity granted to *courts*. No similar prohibition, however, applies to the ICC. Under the ICC's reasonableness powers, the same facts which could not be asserted as a common law or equitable defense to payment of freight charges in a court proceeding may

constitute a basis for the ICC to find either that published rates themselves are unreasonable or that the collection of such rates would be unreasonable.

The decisions of the ICC and the courts are replete with examples of situations in which equitable circumstances which could not be asserted as common law defenses to collection of filed rates in court proceedings have been found to support ICC findings of unreasonableness. For example, even before the effectiveness of deregulation legislation concerning the rail and motor carrier industries in 1980, the ICC had recognized that public policy considerations concerning rail rates warranted a presumption that any published rate in excess of the rate agreed upon between a carrier and shipper and relied upon by the shipper would be unreasonable. *Ex Parte* No. 358-F, *Change of Policy, Rail Road Contract Rates*, 45 Fed. Reg. 21719 (April 2, 1980, reported in *Cleveland Cliffs Iron Co.* v. *ICC*, 664 F2d 568, 573 (6th Cir. 1981). See also, *Coal Colstrip, Kuehn and Decker, MT, To Superior WI*, 364 ICC 152 (1980); *Unit Train Rates — Coal — Burlington Northern, Inc.*, 364 ICC 186 (1980), *affd. sub nom Iowa Power and Light Co.* v. *Burlington Northern, Inc.*, 647 F2d 796 (8th Cir. 1981), *cert. den.* 455 U.S. 907 (1982); *Annual Volume Rates on Coal — Flint Creek, AR*, 364 ICC 753 (1981), *affd. sub nom. Burlington Northern, Inc.* v. *United States*, 679 F2d 915 (D.C. Cir. 1982).

Many prior decisions of the ICC also had recognized that an agreement or course of dealing between a shipper and a carrier to charge particular rates could be given evidentiary effect in determining whether higher published rates should be found unreasonable. *Piedmont Mills, Inc.* v. *Norfolk & W. R. Co.*, 296 ICC 481, 485 (1955) (carrier misquotation and acceptance of lower charges over 3 year period); *Ideal Cement Co.* v. *Atchison, T. & S.F.*, 280 ICC 55, 59 (1951) (confusing

tariff and carrier offer to establish clarifying tariff); *Carson Iron & Steel Co.* v. *Atlantic & N. C. R. Co.*, 237 ICC 724, 728 (1940) (carrier error in tariff publication); *Sheboygan Fruit Box Co.* v. *Chicago & N. W. Ry. Co.*, 214 ICC 157 (1936) (mutual assumption that cancelled rate had remained in effect); *Sutherland Paper Co.* v. *Ann Arbor R. Co.*, 215 ICC 344 (1936); *Armour & Co.* v. *Northern Pacific Ry. Co.*, 209 ICC 277 (1935); *C. A. Wagner Construction Co.* v. *Chicago & N. W. Ry. Co.*, 208 ICC 767 (1935) (emergency need to move shipments before agreed rate could be placed in effect).

In still other cases, the ICC had found that it would be inequitable and an unreasonable practice to apply published tariffs in particular transportation circumstances. *Thermofil, Inc.* v. *Jones Transfer Co., supra*, 355 ICC 828 (charges for trailer use by carrier not owning trailer); *Iowa Beef Processors, Inc.* v. *Western Transportation*, ICC Docket No. 37521 (not printed; September 14, 1981), cited in *Western Transportation Co.* v. *Wilson & Co., supra*, 682 F2d at 1231. *Standard Brands, Inc.* v. *Central R. Co. of N. J., supra*, 350 ICC 555 (document notation requirement unrelated to transportation service).

The policy announced by the ICC in *Negotiated Rates* is a logical extension of these previously exercised powers. The ICC noted that the primary evil which the tariff filing requirement of 49 USC § 10761 was designed to prevent — discrimination between shippers — had been reduced in practical significance by substantial increases in carrier rate flexibility adopted after the Motor Carrier Act of 1980. *Negotiated Rates, supra*, 3 ICC 2d 104. The ICC decided that assignment of controlling weight to prior negotiations or misrepresentation would be granted only on a case-by-case basis, reflecting the particular facts of individual situations. *Id.* at 106, 107. On a particular record, if it could be shown that a shipper-carrier negotiation

of rates without a subsequent carrier rate filing was effected to obtain discriminatory treatment, the ICC would be free to reject a finding of unreasonable practices and protect the policies of 49 USC § 10761. As the ICC noted, its right to change its interpretation of statutes to meet changing factual or policy situations is clearly established by decisions of this Court in *Chevron U.S.A., Inc.* v. *Natural Resource Defense Council*, 467 U.S. 837 (1984) and *American Trucking Association* v. *Atchison T. & S. F. Ry. Co.*, 387 U.S. 397, 416 (1967).

The decision below is totally at odds with the decision of the Eleventh Circuit in *Seaboard System R.R.* v. *United States, supra*, 794 F2d 635. The Eleventh Circuit, unlike the Fifth Circuit below, was willing to allow the ICC to give effect to the understanding between the shipper and carrier rather than forcing adherence to the higher filed rate. The carrier's representation in *Seaboard* that the lower rate was effective resulted from the carrier's own misinterpretation of what the Eleventh Circuit described as a "somewhat unclear published tariff." *Id.* at 636. Closer analysis of the tariff, first by the carrier and then by the ICC revealed, however, that the tariff was unambiguous and provided for a higher rate than had been quoted and agreed to. The court in *Seaboard* noted that the critical factor for the ICC was "the carrier's continuing conduct in misleading the shipper as to the applicable tariff rate." *Id.* at 639. When the carrier advised the shipper that it had changed its interpretation of the tariff, the ICC ruled that the unreasonableness of the carrier's practice came to an end. *Id.* The Fifth Circuit's characterization of *Seaboard* as a case which turns on the ambiguity of the underlying tariff thus is incorrect. The Eleventh Circuit's approval of the ICC's finding that the carrier's breach of its rate agreement consti-

tuted an unreasonable practice thus is directly contrary to the Fifth Circuit's unwillingness to allow the ICC to consider the rate agreement between Petitioner and Caravan.

There is no merit to an argument that any rejection or diminution of the ICC's rate reasonableness powers is dictated by this Court's decision in *Square D Co.* v. *Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986). In *Square D*, the Supreme Court noted that the principle of inviolability of filed rates from court attack under common law had been extended to bar antitrust treble damage actions against rates established by conspiracy in *Keogh* v. *Chigago & Northwestern R. Co.*, 260 U.S. 156 (1922). In affirming the continuing vitality of *Keogh*, the Court in *Square D* made three specific references confirming the powers of the ICC to set aside rates contained in published tariffs. At two points, the Court made specific reference to its holdings in prior cases that rates in published tariffs are binding on shippers and carriers "until suspended or set aside" by the ICC. *Square D, supra*, at 416, 418 n. 22. Moreover, in a lengthy footnote, the Court cited portions of the opinion of Justice Brandeis in *Keogh* describing the unreasonableness remedy available to shippers before the ICC and citing the existence of this remedy as the basis for barring parallel remedies under the antitrust laws.

> What rates are legal is determined by the Act to Regulate Commerce. Under § 8 of the latter act the exaction of any illegal rate makes the carrier liable to the 'person injured thereby for the full amount of damages sustained in consequence of any such violation' together with a reasonable

> attorney's fee. Section 9 and 16 provide for the recovery of such damages either by complaint before the Commission or by an action in a federal court. *If the conspiracy here complained of had resulted in rates which the Commission found to be illegal because unreasonably high or discriminatory, the full amount of the damages sustained, whatever their nature, would have been recoverable in such proceedings. Square D, supra,* at 416, n. 18 (Emphasis added).

Any suggestion that *Square D* constitutes authority for the proposition that a filed rate may not be set aside by the ICC simply is incorrect. Rather, it was the existence of an unreasonableness remedy before the ICC that led the court in *Square D* and *Keogh* to conclude that Congress intended to bar attacks on filed rates under the antitrust laws.

## II.

**A SHIPPER WHICH RAISES THE DEFENSE OF UNREASONABLE PRACTICES IN A MOTOR CARRIER ACTION TO COLLECT FREIGHT CHARGES IS NOT REQUIRED TO PAY THE CHARGES TO THE CARRIER PRIOR TO CONSIDERATION OF ITS DEFENSE BY THE ICC.**

The Court should also reject the statement in the Fifth Circuit opinion that shippers raising unreasonable practice defenses to carrier actions to collect freight charges are required to pay the charges even while their defenses are under consideration before the ICC. It is well settled that issues of unreasonableness of rates and unreasonableness of practices under

49 USC § 10701(a) fall within the exclusive primary jurisdiction of the ICC. *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291 (1922); *United States* v. *Western Pacific Railroad*, 352 U.S. 59, 68 (1956).[3] It likewise is well established that shipper defendants in carrier actions to collect freight charges are entitled to assert as defenses either the contention that the rates sought to be collected are statutorily unreasonable or that collection of these rates would constitute a statutorily prohibited unreasonable practice. *United States* v. *Western Pacific Railroad, supra*, 352 U.S. at 71-73; *Western Transportation Co.* v. *Wilson & Co., supra*, 682 F2d at 1231. In these circumstances, courts regularly have recognized that shippers pleading unreasonable rate or practice defenses to carrier collection actions in court are entitled to stays of the collection actions pending determination of their unreasonableness defenses by the ICC. *Western Transportation Co.* v. *Wilson & Co., supra*, 682 F2d at 1231, 1232; *Seaboard System R.R.* v. *United States, supra*, 794 F2d at 639; *Interoceanic Commodities Corp.* v. *Chicago G.W. Ry. Co.*, 309 ICC 710, 612 (1960); *Bushman Dock & Term.* v. *Chesapeake & O. Ry. Co.*, 302 ICC 183, 186 (1950).

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[3] The ICC's statement in *Negotiated Rates* that its role in a referred case is "advisory" relates only to the fact that the power to impose an actual remedy on a carrier found to have engaged in unreasonable practices rests with the referring court rather than the ICC. *Negotiated Rates, supra*, 3 ICC 2d 107. Review by the referring court of the Commission's findings as to unreasonableness issues is subject to ordinary restrictions on judicial review of federal agency action. The referring court is not free to substitute its own judgment for that of the Commission. See *Keller Industries, Inc.* v. *U.S.*, 449 F2d 163, 174, at n. 31 (9th Cir. 1971), and cases cited therein.

Both the courts and the ICC have recognized specifically that unreasonableness of a rate or practice is an affirmative defense to a carrier collection action, as opposed to an independent claim to be raised by counterclaim or separate suit. *In Re Penn Central Transportation Co.*, 477 F2d 841, 844 (3rd Cir. 1973), *cert. den.* 414 U.S. 885, 923 (1974); *Lawson Concrete Co.* v. *C. & N. W. Transp. Co.*, 367 ICC 109, 111 (1982). Notwithstanding early statements that shippers alleging rates to be unreasonable were required to first pay the rates and then file reparation actions to recover them, later ICC decisions eliminated this requirement by granting specific approval to the carriers' non-collection of rates ultimately found to be unreasonable. See, i.e., *Bradford Coal Co.* v. *Baltimore & O. R. Co.*, 305 ICC 761, 766-67 (1959); *New England Box Co.* v. *Boston & M. R.*, 305 ICC 133, 135 (1958); *Foremost Food & Chemical Co.* v. *Alton & S. R.*, 318 ICC 35, 39 (1962).

There is no precedential support for the statements of the Fifth Circuit below that "a court may not stay enforcement of the filed tariff rate on the ground that the shipper has pled unreasonableness" or that "a carrier is entitled to enforce the filed rates under the filed tariff doctrine and to seek payment of undercharges in the district court even while the reasonableness of the tariffs is challenged before the commission."[4] (B-9 at n. 6, B-8). The only case cited by the Fifth Circuit in support of these propositions is *Southern Pacific Transp. Co.* v. *City of San Antonio*, 748 F2d 266 (5th Cir. 1984). *Southern Pacific* arose out of this Court's opinion in *Burlington Northern* v. *U.S.*, 459 U.S. 131 (1982). It essentially enforced this Court's holding that

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[4] These statements by the Fifth Circuit in reality are merely *dicta*. The effect of the Fifth Circuit's opinion was to foreclose the litigation of reasonableness issues before the ICC.

reviewing courts lack the power to delay the implementation of proposed rate increases found not to be unreasonable by the ICC. *Southern Pacific Transp. Co.* v. *City of San Antonio, supra,* at 748 F2d 273.

The decision in *Burlington Northern* reflected this Court's concern that preventing *future* rate proposals from taking effect on the grounds of alleged unreasonableness would irrevocably prejudice the carriers because of their lack of a remedy to recover revenue shortfalls from shippers for the period of litigation. *Burlington Northern* v. *U.S., supra,* at 459 U.S. 139, 141-143. This irreparable harm to the carrier is not present in cases in which unreasonableness of a rate or rate practice is raised as a defense to a carrier action to collect published charges on *past* shipments. In that situation, the carrier will always retain its collection remedy against the shipper in the event that the shipper is unsuccessful in obtaining a determination of unreasonableness from the ICC. There is no indication in *Burlington Northern* that this Court intended to foreclose shipper rights to raise the unreasonableness defenses to actions to collect past shipments which this Court had recognized in *United States* v. *Western Pacific Railroad, supra,* 352 U.S. 59.

## III.

## THE IMPORTANT FEDERAL INTEREST IN SECURING LOWER RATE SCHEDULES FOR GOVERNMENT TRAFFIC REQUIRES COURTS TO ACCEPT DELAYED ASSERTION OF SUCH INTERESTS IN COURT PROCEEDINGS.

Certiorari also should be granted for the purpose of protecting the statutorily recognized public interest in securing lower and more competitive rates for transportation for the government. 49 USC § 10721(b)(1) provides that such transportation may be provided without

charge or at reduced rates. Carriers performing transportation falling within this exemption are permitted to "agree with the government to a lower rate schedule for government carriage." *Baggett Transportation Co.* v. *United States*, 670 F2d 1011, 1012 (Cl. Ct. 1982). The defenses of prior agreement and estoppel against the assessment of a higher published rate are available in actions involving traffic in this category. *Jetco, Inc.* v. *U.S., supra*, 11 Cl. Ct. at 845. The government traffic exemption is applicable even to shipments initially billed to private shippers rather than to the government when the government "directly and completely reimburses the party which initially bears the freight charges," where "the government receives the entire benefit of the reduced rates," and where the shipper "is merely acting as a conduit" for passage of the reduced rate through to the government. *Interpretation of Govt. Rate Tariff — Eastern Central*, 323 ICC 347, 349, 351, 352 (1964), *rev'd on other grounds, Middle Atlantic Conference, et al.* v. *United States*, 265 F. Supp. 448 (D. Md. 1967). Information presented in affidavits submitted below prior to the entry of summary judgment indicated that such factors may be applicable to Petitioner's shipments to governmental units.[5]

The significant public interest in ensuring low-cost transportation for governmental shipments is impaired by the decision below to bar consideration of this issue because Petitioner did not raise it initially as a legal issue in opposition to summary judgment. While trial courts have discretion to decline reconsideration of legal arguments which are not raised initially in opposition to summary judgment motions, such discretion is not unlimited. Delays in submitting legal arguments should not be fatal where the failure to hear such argu-

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[5] (Affidavit of S. Spiritas, May 1, 1986, at pp. 2-3.)

ments would result in a miscarriage of justice or frustrate a significant public policy. *McCrea* v. *Harris County Houston Ship Channel Nav. Dist.*, 423 F2d 605, 610 (5th Cir. 1970); *Western Transportation Co.* v. *Wilson & Co., supra*, 682 F2d at 1232. The legislative history of 49 USC § 10721(b)(1) and its predecessors shows a clearly expressed intention by Congress to maintain a preferred position for governments in their transportation dealings. See Senate Report No. 410, U.S. Code Cong. and Admin. News, 85th Congress, First Session (1957), p. 1782; *Increased Freight Rates, E. W. & S. Territories, 1956*, 300 ICC 633, 669 (1957). Assertion of such defenses by Petitioner in connection with its shipments for the government should not have been rejected.

## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

By: /s/ JOHN W. BRYANT
*Counsel of Record*

/s/ NEILL T. RIDDELL

EAMES, WILCOX, MASTEJ AND BRYANT
900 Guardian Building
Detroit, Michigan 48226
Telephone: (313) 963-3750

*Counsel for Petitioner*

Dated: May 30, 1989

# APPENDICES TO PETITION FOR CERTIORARI

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## APPENDIX A

### ORDER DENYING REHEARING

(United States Court of Appeals – Fifth Circuit)

(Filed March 1, 1989)

(IN THE MATTER OF: CARAVAN REFRIGERATED CARGO, INC., Debtor; SUPREME BEEF PROCESSORS, INC., Appellant, versus ROBERT YAQUINTO, JR., Trustee for Caravan Refrigerated Cargo, Inc., Appellee — No. 88-1209; Appeal from the United States District Court for the Northern District of Texas)

*ON PETITION FOR REHEARING*
*AND SUGGESTION FOR REHEARING EN BANC*

(Opinion 02/02/, 5 Cir., 1989, __ F.2d __)
(MARCH 1, 1989)

Before: REAVLEY, HIGGINBOTHAM
and SMITH, Circuit Judges.

PER CURIAM:

☑ The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

☐ The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit

Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

☐ A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. Smith
United States Circuit Judge

REHG-6

*CLERK'S NOTE: SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.*

# APPENDIX B

## OPINION

**[*PUBLISHED AT* 864 F.2d 388]**

(United States Court of Appeals — Fifth Circuit)

(Filed February 2, 1989)

(In the Matter of CARAVAN REFRIGERATED CARGO, INC., Debtor, SUPREME BEEF PROCESSORS, INC., Appellant, v. Robert YAQUINTO, Jr., Trustee for Caravan Refrigerated Cargo, Inc., Appellee — No. 88-1209; Appeal from the United States District Court for the Northern District of Texas)

Before: REAVLEY, HIGGINBOTHAM, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

This is an archetypal "negotiated rate case" involving a motor carrier and a shipper of beef. The well-worn choreography for these cases involves a motor carrier's action against a shipper to collect for undercharges; that is, to collect the difference between the higher rate which the carrier has filed with the Interstate Commerce Commission (the "Commission") and the rate which the parties had negotiated.

In the action before us, the district court refused to refer the case to the Commission and granted summary judgment for the carrier over the shipper's objection that the filed tariff was unreasonable. The shipper sought the district court's reconsideration on the ground that its business with the carrier was at the behest of the government, but the court refused to reconsider. Agreeing with the district court that sum-

mary judgment was appropriate and that the motion for reconsideration was properly denied, we affirm.

## *I.*

## A GREAT DEAL WHILE IT LASTED.

Supreme Beef Processors, Inc. ("Supreme Beef"), is a major producer and supplier of beef products to the United States Government. Caravan Refrigerated Cargo, Inc. ("Caravan"), supplied refrigerated transport services to Supreme Beef for several years prior to Caravan's bankruptcy. According to Supreme Beef, it had a longstanding agreement with Caravan that Caravan would "meet or beat" any motor carrier rate quoted by a competing carrier. This agreement enabled Supreme Beef to rely upon low-cost transportation for purposes of preparing its bids. In return, Caravan was guaranteed a large volume of shipping business from Supreme Beef.

During their relationship, Supreme Beef and Caravan continually negotiated the transportation rates to assure competitiveness with other carriers' rates. Caravan billed Supreme Beef for the agreed rates, and Supreme Beef paid those bills. The negotiated rates for the shipments in question here, however, were not the same as those that Caravan had filed with the Commission: The filed rates were higher. From the summary judgment record, it appears that Supreme Beef was unaware of the variance, and had relied upon Caravan's rate quotations. After Caravan's bankruptcy, the trustee filed the instant suit to collect from Supreme Beef the difference between the negotiated rates and the filed rates for those periods during which Caravan did not have the actual, negotiated rates on file; the parties agree that the difference amounts to $70,227.08.

On appeal, Supreme Beef contends that the court erred in failing to refer the case to the Commission, where it could contest the reasonableness of the filed rates, or in the alternative, to deny the summary judgment motion on the basis of Supreme Beef's defense of unreasonableness. Supreme Beef also urges that we find error in the district court's refusal to vacate the summary judgment order after Supreme Beef had presented factual evidence as to the government-carrier exemption.

## *II.*

## WHERE'S THE BEEF?

Supreme Beef's first contention is that this case was litigated in the wrong forum. It invokes the primary jurisdiction doctrine and contends that the district court should have referred the dispute to the Commission in the interests of uniformity and expert administration of issues of transportation policy. *See United States* v. *Western Pac. R.R.*, 352 U.S. 59, 65, 77 S.Ct. 161, 165, 1 L.Ed.2d 126 (1956).

Under the primary jurisdiction doctrine, "a district court trying a case under the Interstate Commerce Act must, if presented with such an issue, stay its proceedings and refer the case to the Commission." *City of New Orleans* v. *Southern Scrap Material Co.*, 704 F.2d 755, 758 (5th Cir. 1983) (citing *ICC* v. *Atlantic Coast Line Ry.*, 383 U.S. 576, 579, 86 S.Ct. 1000, 1003, 16 L.Ed.2d 109 (1966)). In addition, we have stated that when "the reasonableness of a rate is at issue, 'there must be preliminary resort to the Commission.'" *Southern Pac. Transp. Co.* v. *City of San Antonio*, 748 F.2d 266, 272 (5th Cir. 1984) (quoting *Great N. Ry.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291, 42 S.Ct. 477, 479, 66 L.Ed. 943 (1922)). Supreme Beef thus contends that because Caravan's suit was based upon section

10761(a) of the Interstate Commerce Act, and because it properly pled unreasonableness as a defense, the district court was required to refer the case.

Here, however, the facts do not raise technical or complex issues, regarding appropriate rates, that require the expert administration of the Commission and thereby invoke the primary jurisdiction doctrine. Supreme Beef bases its charges of unreasonableness upon the unfairness of having to pay the filed rate because Caravan "failed to get its paperwork done." In reality, this dispute concerns only the applicability of 49 U.S.C. § 10761(a), which provides that a carrier subject to the jurisdiction of the Commission "may not charge or receive a different compensation for . . . transportation or service than the rate specified in the tariff." [1] The purpose of this statute is to prevent large suppliers and shippers from negotiating "under-the-table" tariffs, lower than the filed tariffs, and thus undercutting competition from smaller suppliers who must also use the highways of interstate commerce to get their goods to market.

Judicial interpretations of section 10761(a) and its predecessors have given rise to the "filed tariff doctrine," which Justice Brandeis ably explained as follows:

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[1] Section 10761(a) provides in full:

> (a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

> The rate of a carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it . . . Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. The rule is undeniably strict, and it may work hardship in some cases, but it embodies the policy which has been adopted by Congress in regulation of interstate commerce in order to prevent unjust discrimination.

*Louisville & Nashville Ry.* v. *Maxwell*, 237 U.S. 94, 35 S.Ct. 494, 495, 59 L.Ed. 853 (1915).

Supreme Beef contends, however, that the filed tariff doctrine has been weakened and that the district court should have referred the case so that it could contest the reasonableness of Caravan's filed rates in light of Caravan's misquotations. As support for its argument, Supreme Beef cites the Motor Carrier Act of 1980; an advisory opinion from the Commission, *National Indus. Transp. League (Ex Parte MC-177)*, 3 I.C.C.2d 99, 86 Fed.Carr.Cas. (CCH) ¶ 37,284 (Aug. 7, 1987); and a recent Eleventh Circuit opinion upholding a Commission ruling that a carrier had engaged in an unreasonable practice by misquoting rates to the shipper.[2]

Supreme Beef's claim is that with the Motor Carrier Act, Congress sought to make the industry more competitive by reducing the burden which filing tariffs imposes and that the Commission recognized this change when it declared in its advisory opinion that "equitable defenses to rigid application of filed tariff

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[2] *See Seaboard Sys. R.R.* v. *United States*, 794 F.2d 635, 537 (11th Cir. 1986).

rates should be available on a case-by-case basis." Moreover, as the *Seaboard System* case demonstrates, a circuit court of appeals has approved the Commission's willingness to find that misquotation constitutesd an unreasonable practice. We respond to each of these authorities in turn.

*A.* THE MOTOR CARRIER ACT.

We cannot agree that the 1980 Act abrogates the filed tariff doctrine, as we cannot ignore the plain fact that when Congress examined this area in 1980, it did so in light of section 10761(a) and the long-standing judicial interpretations of that statute. In fact, the changes which Congress did make, a filing exemption for contract carriers, for example,[3] indicate that its intent was to leave the filed tariff doctrine very much intact. Any change in the law must therefore come from Congress, not this court.

In an analogous context, the Supreme Court has refused to overturn doctrine established prior to the Motor Carrier Act which Congress did not expressly abrogate. In *Square D Co.* v. *Niagara Frontier Tariff Bureau*, 476 U.S. 409, 106 S.Ct. 1922, 90 L.Ed.2d 413 (1986), the Court upheld its previous ruling in *Keogh* v. *Chicago & Northwestern Ry.*, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922). Under the "*Keogh* doctrine," shippers could not bring treble-damage antitrust actions against carriers in connection with filed tariffs, though governmental and injunctive antitrust actions against

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[3] *See* 49 U.S.C. § 10761(b), which provides that

> "[t]he Commission may grant relief from subsection (a) of this section when relief is consistent with the public interest and . . . transportation policy." Contract carriers are those carriers that, like Caravan, have established a contractual arrangement with a shipper and that must adjust rates more quickly than the normal filing process permits.[ "]

"concerted rate-making" activities were still available. Answering the argument that the *Keogh* doctrine should be overturned in light of Congress's intent to promote competition in the transportation industry through the Motor Carrier Act, Justice Stevens wrote,

> [W]e may assume that petitioners are correct in arguing that the *Keogh* decision was unwise as a matter of policy — but it nevertheless remains true that Congress must be presumed to have been fully cognizant of this interpretation of the statutory scheme, which had been a significant part of our settled law for over half a century, and that Congress did not see fit to change it when Congress carefully reexamined this area of law in 1980.

*Square D*, 476 U.S. at 420, 106 S.Ct. at 1928.

The facts here present an even more persuasive case for deference. One of the Motor Carrier Act's most significant changes creates an *exemption* from filing requirements for contract carriers, evincing Congress's desire that all other carriers should continue to adhere to the filing requirements. Moreover, section 10761(a) and the filed tariff doctrine, integral as they are to the publication and enforcement of reasonable, non-discriminatory rates, are not so obviously unwise and anti-competitive as Justice Stevens seems to suggest the *Keogh* doctrine may be. Thus, following the Supreme Court's lead in *Square D*, we are unwilling to permit Supreme Beef's unreasonableness defense to undermine the filed tariff doctrine.

*B.* NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE.

The Commission's advisory opinion in *National Industrial Transportation League (Ex parte MC-177)* is inapposite to

this case. The Commission's expression of its decision to allow equitable defenses in disputes before it regarding the reasonableness of rates has, of course, no binding effect upon this court.[4]

Instead, our decision is governed by our opinion in *Southern Pacific Transportation Co.* v. *City of San Antonio.* There, we overturned a district court's stay of an execution of judgment by two railroads seeking to collect undercharges for shipments of coal to a city power plant. The district court had granted the stay pending the Commission's determination of the reasonableness of the railroad's filed rates. We stated,

> The Interstate Commerce Act . . . entails a balanced and coherent system for the payment and review of rates. The shipper is required to pay the filed rate at the time of shipment but may later seek review and reparations in the I.C.C. The carrier, on the other hand, receives assurance that payment will not be delayed pending review; but the carrier must be prepared to reimburse amounts later found to be unreasonable.

748 F.2d at 274.

Thus, our precedent declares that a carrier is entitled to enforce the filed rates under the filed tariff doctrine and to seek payment of undercharges in the district court even while the reasonableness of the tariffs is challenged before the Commission. The rule is necessary to protect the filed tariff doctrine and its under-

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[4] *See Pacific Gas & Elec. Co.* v. *Federal Power Comm'n*, 506 F.2d 33 (D.C.Cir. 1974). The court noted, "[A] general statement of policy only announces what the agency seeks to establish as policy . . . When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued." *Id.* at 38 (footnote omitted).

lying policy of ensuring reasonable and non-discriminatory rates.[5]

Our decision here is an application of the same rule: A shipper that pleads unreasonableness as a defense cannot prevent enforcement of the filed tariff doctrine or force the district court to stay proceedings and refer the case to the Commission.[6] Any other decision would constitute legislation on our part; it would create an exception that swallows the doctrine and thereby would vitiate a long-standing and notorious policy which Congress has visited and left intact.

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[5] *See id.*; *see also Regular Common Carrier Conference* v. *United States*, 793 F.2d 376, 379 (D.C.Cir. 1986). There, the court declared invalid a Commission regulation that would have allowed motor carriers to leave a "paper-trail" of negotiated tariffs with shippers rather than file tariffs with the Commission. Judge (now Justice) Scalia explained further the policy behind the requirement that shippers and carriers adhere to the filed tariffs:

> That requirement is utterly central to the [Interstate Commerce] Act. Without it, for example, it would be monumentally difficult to enforce the requirement that rates be reasonable and non-discriminatory, *see* 49 U.S.C. §§ 10701 & 10741(b), and virtually impossible for the public to assert its right to challenge the lawfulness of existing or proposed rates, *see* 49 U.S.C. §§ 10708(a)(1) & 11701(a).

[6] Supreme Beef's attempt to distinguish *Southern Pac. Transp. Co.* v. *City of San Antonio* is unpersuasive. It observes that the case involved the reasonableness of railroad rates rather than motor carrier rates and points out that the Commission has long reviewed the reasonableness of railroad rates, while only recently having decided, via its advisory opinion in *National Indus. Transp. League*, to review the reasonableness of motor carrier rates. This distinction, however, only serves to strengthen the precedential value of *Southern Pacific* in the present context. Again, the rule stated in that case is that a court may not stay enforcement of the filed tariff rate on the ground that the shipper has pled unreasonableness or sought a hearing before the Commission. Thus, regardless of whether the Commission is willing to consider the reasonableness of motor carrier or railroad rates, the court may not put the brakes on the filed tariff doctrine.

C. SEABOARD SYSTEM.

Supreme Beef would also find support for its referral argument in *Seaboard System R.R.* v. *United States*, in which the Eleventh Circuit upheld the Commission's ruling in a negotiated rate case that a carrier had engaged in an unreasonable practice by misquoting rates to a shipper. The Commission therefore refused to permit the carrier to collect for undercharges. The Commission found authority for its ruling in two different statutes: 49 U.S.C. § 10701(a), which provides that a "practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under Chapter 105 of this title must be reasonable," and 49 U.S.C. § 10704 (a)(1), which authorizes the Commission to order a carrier to stop a violation.

Supreme Beef thus contends that because the Commission is willing to find that misquotation constitutes an unreasonable practice, and because the Eleventh Circuit has recognized the Commission's authority to make such findings, this court also should recognize that authority and hold that it was error for the district court to refuse to submit the case to the Commission in the face of Supreme Beef's allegations of misquotation and unreasonableness.

However, Supreme Beef does not tell the whole story of *Seaboard System*. Central to that case was the Commission's finding that the tariff filed with the Commission and sought to be enforced was not "plain to the ordinary user." 794 F.2d at 637. The importance of this additional finding cannot be understated; under the filed tariff doctrine, shippers are charged with constructive knowledge of the tariffs which the carrier has filed with the Commission. *See Maxwell*, 237 U.S. at 97, 35 S.Ct. at 495. Thus, it is only when that tariff is unclear

or ambiguous to the ordinary user that the Commission is willing to relax the filed tariff doctrine and consider the possibility that misquotation might be an unreasonable practice.

Supreme Beef has not claimed nor offered any evidence to show that the rates which Caravan had filed with the Commission were not plain to the ordinary user. *Seaboard System* therefore offers no support for its contentions of unreasonableness and does not represent a weakening of the filed tariff doctrine.

*III.*

ADDITIONAL BEEFS.

Supreme Beef charges that the district court's summary judgment order was in error on two additional grounds. First, it argues that the trustee's cross-motion for summary judgment was untimely in light of the district court's having set the deadlines for such motions, pursuant to Fed.R.Civ.P. 16(b), at December 15, 1987. The trustee filed his cross-motion on December 29, 1987. Second, it asserts that its motion for reconsideration presented triable issues of fact as to Caravan's special status as a carrier of government goods.

In making this first argument, Supreme Beef ignores the fact that a district court may grant summary judgment for the non-movant *sua sponte*. We have noted that when "one party moves for summary judgment the district court, in an appropriate case, may grant summary judgment against the movant, even though the opposite party has not actually filed a motion for summary judgment." *Landry* v. *G.B.A.*, 762 F.2d 462, 464 (5th Cir. 1985) (citing 10A C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure: Civil 2d*

§ 2720)). The cited treatise explain[s] that granting summary judgment in favor of the non-moving party is

> in keeping with the objective of Rule 56 to expedite the disposition of cases, and, somewhat more remotely, with the mandate of Rule 54(c) requiring the court to grant relief to which a party is entitled 'even if the party has not demanded such relief in his pleadings.'

10A C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure: Civil 2d* § 2720 at 33 (quoting Fed.R.Civ.P. 54(c)). We see no reason why the same reasoning should not apply in a situation where, as here, the non-movant has failed to meet a motion deadline.

Second, Supreme Beef makes the argument that had the district court considered the fact that Caravan held a Master Certificate of Public Convenience exempting it, as a carrier of government goods, from normal filing requirements,[7] the court then would have had to enforce the negotiated rate rather than the filed rate. However, Supreme Beef failed to call the court's attention to this argument in its motion for summary judgment. It raised the point for the first time in its motion for reconsideration.

We note that a motion to reconsider or amend should not be employed "to introduce evidence that was available at trial but was not proffered, to relitigate old issues, to advance new theories, or to secure a rehearing on the merits." *Fontenot* v. *Mesa Petroleum Co.*, 791 F.2d 1207, 1219 (5th Cir. 1986). Our review of the record indicates that Supreme Beef made no showing that it had newly discovered the evidence it presented regarding the government contracts, nor did it bring

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[7] *See* 49 U.S.C. § 10721.

that evidence to the court's attention prior to summary judgment, or marshal legal support for its government-exemption claim.

Thus, Supreme Beef's motion for reconsideration was nothing more than an attempt to present a new legal theory to the court on the basis of affidavits it already had submitted with its original summary judgment motion. The district court therefore properly denied the motion for reconsideration.

*IV.*

CONCLUSION.

Supreme Beef has failed to persuade us that we should weaken the filed tariff doctrine by holding that a defense of unreasonableness will trigger a referral to the Commission. Nor has it demonstrated that the district court acted improperly in granting summary judgment for Caravan and denying the motion for reconsideration. Hence, the district court's summary judgment order is in all respects AFFIRMED.

# APPENDIX C

## ORDER DENYING RECONSIDERATION

(United States District Court —
Northern District of Texas — Dallas Division)

(Filed March 4, 1988)

(ROBERT YAQUINTO, JR., TRUSTEE FOR CARAVAN REFRIGERATED CARGO, INC., Plaintiff, v. SUPREME BEEF PROCESSORS, INC., Defendant — CA 3-87-2274-R; *Entered on Docket pursuant to F.R.C.P. Rules 58 and 79a*)

On January 20, 1988, this Court entered its Memorandum Opinion and Order granting Plaintiff's motion for summary judgment and denying Defendant's cross-motion for summary judgment. This Court entered a Final Judgment in accordance with that opinion, and Defendants have filed a "motion to reconsider." [1] This motion will be **DENIED**.

First, to the extent Defendant reargues its position that the filed tariff doctrine is subject to equitable modification, this Court remains unpersuaded.

Second, to the extent Defendant raises for the first time its argument that the shipments in question were conducted pursuant to a statutory exemption to the filed tariff doctrine, this Court considers the argument improper. Defendant has completely changed its tactic in defending this lawsuit after entry of final judgment. [2]

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[1] This Court may properly entertain Defendant's motion as a motion to alter or amend a judgment under Rule 59(e).

[2] Defendant has submitted an affidavit purporting to illustrate that Caravan's activities were conducted pursuant to 49 U.S.C. § 10721, and that no tariffs were required to be filed.

Nowhere in its brief supporting its motion does Defendant explain why this new theory was not previously offered to the Court. *See e.g., Frito-Lay of Puerto Rico, Inc.* v. *Canas*, 92 F.R.D. 384, 391 (D.P.R. 1981).

Third, Defendant's argument regarding its government exemption does not appear to have any merit. This Court is persuaded by Plaintiff's brief in response that the shipments in question did not fall into any government exemption. Consequently, even if Defendant's new theory were properly before this Court, it would not convince this Court that the prior judgment was erroneous.

Accordingly, it is the **ORDER** of this Court that Defendant's motion for reconsideration is hereby **DENIED**.

**SIGNED** this 4th day of March, 1988.

/s/ JERRY BUCHMEYER
UNITED STATES DISTRICT JUDGE

## APPENDIX D

### MEMORANDUM OPINION AND ORDER
*[OF JANUARY 20, 1988]*

(United States District Court —
Northern District of Texas — Dallas Division)

(Filed January 20, 1988)

(ROBERT YAQUINTO, JR., TRUSTEE FOR CARAVAN REFRIGERATED CARGO, INC., Plaintiff, v. SUPREME BEEF PROCESSORS, INC., Defendant — CA 3-87-2274-R)

*I.*

This is a negotiated rate case in which Plaintiff Robert Yaquinto, Jr., as Trustee for the motor carrier Caravan Refrigerated Cargo, Inc. ("Caravan") seeks to recover on an undercharge for shipments of beef for Defendant Supreme Beef Processors, Inc. ("Supreme"). Now before this Court are the cross motions for summary judgment filed by Supreme and Caravan. Both parties agree that this case is now ripe for disposition on summary judgment. For the reasons discussed below, Supreme's motion will be **DENIED** and Caravan's motion will be **GRANTED**.

*II.*

The facts present an archetypical negotiated rate case. Supreme is the largest supplier of meat to the United States Department of Defense and a major supplier to the United States Department of Agriculture. Supreme's sales to government agencies are obtained on a low bid basis. Caravan has provided Supreme refrigerated transport services for several years prior to its bankruptcy filing. According to Supreme, it had a longstanding

agreement with Caravan that Caravan would "meet or beat" any motor carrier rate quoted by a competing carrier. This agreement enabled Supreme to rely on low cost transportation for purposes of preparing its bids. In return, Caravan was guaranteed a large volume of shipping business from Supreme.

During their relationship, Supreme and Caravan continually negotiated the transportation rates to assure their competitiveness with other carriers. Caravan invoiced Supreme for the agreed rates and Supreme accepted and paid the invoices. Caravan, however, did not have all these rates filed with the Interstate Commerce Commission ("ICC"). These filed rates were higher than those actually negotiated and charged to Supreme. From the summary judgment record it appears that Supreme was unaware of the variance between the negotiated rates and the rates on file with the ICC.[1] Moreover, it is undisputed that Supreme relied upon the quoted rates in using Caravan as its carrier.

Caravan filed a contract carrier application with the ICC in order to facilitate the handling of traffic for Supreme and to enable them to negotiate or set rates with more flexibility. Caravan's bankruptcy occurred prior to the contract carrier authority being approved. After Caravan's bankruptcy filing, Trustee sought to collect from Supreme the filed tariff rates for those periods Caravan did not have the actual, negotiated rates on file. Both parties admit this amount to be $70,227.08. Supreme has defended and counterclaimed on the basis of its reliance upon the negotiated rates.

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[1] Supreme's affidavits support its contention that it was unaware of the rates on file. Caravan has responded without affidavits or argument disagreeing with Supreme's contention, relying instead solely upon its legal argument.

*III.*

The sole legal issue presented by the cross motions is whether the filed tariff rates were superseded by Defendant's good faith reliance upon a lower negotiated rate. Defendant admits that the basic rule in this area is that tariff rates govern; this rule has now become known as the "Filed Tariff Doctrine." Nevertheless, Defendant relies upon the ICC's advisory opinion of Ex Parte No. MC-177 in which the ICC stated that equitable defenses can be used to ameliorate the harsh effect of a literal application of the Filed Tariff Doctrine. In that opinion, the ICC stated that:

> The question that we are addressing here is whether a shipper must pay the rate established in a tariff where a motor common carrier has negotiated a lower rate and has indicated that the negotiated rate would be the one charged, (and therefore presumably filed as a tariff). We believe, in the highly competitive motor carrier industry and economy in general, equitable defenses to rigid application of filed tariff rates should be available on a case-by-case basis and that our unreasonable practice jurisdiction authorizes such an approach.

Ex parte No. MC-177.[2]

Title 49 U.S.C. § 10761 states that a common carrier subject to the jurisdiction of the ICC under 49 U.S.C. § 10501 and which has filed a tariff for a service "may not charge or receive a different compensation for that

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[2]The unreasonable practice jurisdiction to which the ICC refers apparently is based on 49 U.S.C. § 10701(a) which states that:

> A rate . . . relating to transportation or service by a carrier subject to the jurisdiction of the Interstate Commerce Commission under Chapter 105 of this title must be reasonable.

transportation or service than the rate specified in the tariff . . . ." The rationale behind the Filed Tariff Doctrine is to prevent large shippers, such as Supreme, from exacting discriminatory shipping rates from carriers to the competitive disadvantage of smaller shippers. Consequently, strict adherence to the doctrine is necessitated by its intended effect:

> The rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, . . . ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it may work hardship in some cases, but it embodies the policy which has been adopted by Congress in regulation of interstate commerce in order to prevent unjust discrimination.

*Louisville and Nashville R.R. Co.* v. *Maxwell*, 237 U.S. 94 (1915).

Numerous cases have applied the Filed Tariff Doctrine to allow recovery by a carrier for the filed tariff rate notwithstanding the existence of a lower, negotiated rate. *See e.g., Consolidated Freightways Corp.* v. *Terry Tuck, Inc.*, 612 F.2d 465, 466 (9th Cir.), *cert. den'd*, 447 U.S. 907 (1980); *Aero Trucking, Inc.* v. *Regal Tube Co.*, 594 F.2d 619, 621-22 (7th Cir. 1979); *Southern Pacific Transportation Co.* v. *Campbell Soup Co.*, 455 F.2d 1219, 1221 (8th Cir. 1972). Moreover, courts have also held that equitable defenses, such as fraud and estoppel, cannot be used by a shipper to circumvent the Filed Tariff Doctrine. As the Fifth Circuit has noted, "[e]quitable considerations cannot . . . be invoked as the basis for an estoppel to collect [authorized tariff] charges. . . . Filed tariffs are public information . . . of

which shippers should be aware." *Illinois Central Gulf Railroad Co.* v. *Golden Triangle Wholesale Gas Co.*, 586 F.2d 588, 592 (5th Cir. 1978). *See also, Aero Trucking, Inc.* v. *Regal Tube Co.*, 594 F.2d 619 (7th Cir. 1979); *Chicago, Burlington & Quincy Railroad Co.* v. *Ready Mixed Concrete Co.*, 487 F.2d 1263, 1266 (8th Cir. 1973); Wade, *Hidden Liability for Freight Bills*, Mo. B.J., April-May 1987, at 175.

Defendant argues that the Motor Carrier Act of 1980 displayed a congressional intent to allow equitable modification of the Filed Tariff Doctrine. The Supreme Court, however, has already rejected this argument stating that "The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. . . . The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." *Square D Co. and Big D Building Supply Corp.* v. *Niagara Frontier Tariff Bureau, Inc.*, 106 S.Ct. 1922 (1986).

Likewise, Defendant's argument that the ICC's advisory opinion in MC-177 is binding upon this Court is totally without support. First, MC-177 is merely an advisory opinion and as such provides no precedential value. *Pacific Gas & Electric Co.* v. *F.P.C.*, 506 F.2d 33 (D.C.Cir. 1974). Second, and more fundamentally, an administrative agency cannot overrule the statutory requirements to publish and charge rates as set forth in tariffs. Congress was fully cognizant of the well established interpretation of § 10761 when it enacted the Motor Carrier Act of 1980, and yet Congress chose not to amend that section.

Finally, this Court disagrees with Defendant's equitable argument. The equities in this case clearly favor application of the Filed Tariff Doctrine. Tariffs have the force and effect of law. *TADMS, Inc.* v. *Consolidated Freightways*, 619 F. Supp. 385 (C.D.Cal. 1985). Defendant is charged with notice of the properly filed tariffs. Consequently, its argument of ignorance is unavailing. Were this Court to excuse Defendant from

compliance with § 10761 it would be emasculating that section's ability to prevent discriminatory allowances by carriers. Moreover, § 10761(b) already provides for equitable relief in the form of the ICC's ability to grant applications for contract carrier status in exceptional situations. Defendant should have waited until Plaintiff completed such an application before relying upon negotiated rates lower than those appearing in the filed tariffs.

Consequently, this Court holds that no basis exists for excusing Defendant from its obligation to pay Plaintiff at the filed tariff rates. Parties may not enter into a valid contract for transportation at a rate lower than that contained in a published tariff. This result is affected by neither estoppel, misquotation or fraud of the carrier. *See also, Motor Carrier Audit & Collection Co.* v. *United Food Service*, CA 87-C-298 (D.Col. May 4, 1987). Since Defendant's affirmative defenses and counterclaims have no merit, Plaintiff is entitled to judgment on its claim for the undercharges. Additionally, Plaintiff is entitled to recover prejudgment interest on its claim. *Southern Pacific Transportation Co.* v. *San Antonio*, 748 F.2d 266 (5th Cir. 1984).

Accordingly, this Court **ORDERS** the following:

1. Defendant's motion for summary judgment is **DENIED**.
2. Plaintiff's motion for summary judgment is **GRANTED**.
3. Plaintiff is **directed** to submit a proposed final judgment to this Court within **ten (10)** days from the date of this Order.

**SIGNED** this 20 day of January, 1988.

/s/ JERRY BUCHMEYER
UNITED STATES DISTRICT JUDGE

## APPENDIX E

### MEMORANDUM OPINION AND ORDER
*[OF NOVEMBER 13, 1987]*

(United States District Court —
Northern District of Texas — Dallas Division)

(Filed November 13, 1987)

(IN RE: CARAVAN REFRIGERATED CARGO, INC., Debtor, ROBERT YAQUINTO, JR., TRUSTEE FOR CARAVAN REFRIGERATED CARGO, INC., Plaintiff, v. SUPREME BEEF PROCESSORS, INC., Defendant — CA 3-87-2274-R; *Entered on Docket 11-13-87 pursuant to F.R.C.P. Rules 58 and 79a*)

This is a case involving a dispute as to the amount owed by Defendant, Supreme Beef Processors, Inc. ("Supreme"), to Debtor Caravan Refrigerated Cargo, Inc. ("Debtor" or "Caravan"), brought by the Trustee in bankruptcy. Supreme and Debtor had a contractual relationship whereby Debtor would transport Supreme's beef products. The current dispute concerns the proper charges for the transportation of Supreme's products by Debtor. Essentially, the question turns on whether Debtor was bound by an alleged agreement which gave Supreme a discount rate or if Debtor is entitled to recover from Supreme for the higher, actual rates on filie during the relevant time period. Now before this Court is Supreme's motion for referral of this essential question to the Interstate Commerce Commission ("ICC"). This motion will be **DENIED**.

Citing the ICC's specialized competence in matters pertaining to the reasonableness of transportation rates, Supreme argues that referral is mandatory. In support of

this proposition, Supreme refers to several cases discussing the wisdom of referral in certain instances, and to 28 U.S.C. § 1336(b).[1] After reviewing these authorities, however, this Court is not convinced that referral is mandatory in this case. Moreover, in its discretion, this Court also determines that referral of this matter would not be in the best interests of justice or efficiency in light of the questions involved and the amount in controversy. This Court feels amply qualified to render a decision on the matter unaided by a prior ICC determination.

Accordingly, it is the **ORDER** of this Court that Defendant Supreme's motion for referral to the ICC should be, and is hereby **DENIED**.

**SIGNED** this 13th day of November, 1987.

/s/ JERRY BUCHMEYER
UNITED STATES DISTRICT JUDGE

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[1] In particular, Supreme relies upon *New Orleans* v. *Southern Scrap Material Co., Ltd.*, 704 F.2d 755 (5th Cir. 1983). In that case, the panel stated that "[t]he primary jurisdiction doctrine requires that issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by [the] Act be submitted initially to the Commission for determination." *Id* at 758. This Court, however, does not feel that the question of whether Debtor was bound by the alleged agreement involves a policy determination that should first be considered by the ICC.

# APPENDIX F

## ORDER DENYING DEFENDANT SUPREME BEEF PROCESSORS, INC.'S MOTION TO TRANSFER TO THE INTERSTATE COMMERCE COMMISSION

(United States Bankruptcy Court —
Northern District of Texas — Dallas Division)

(Entered July 11, 1987)

(IN RE: CARAVAN REFRIGERATED CARGO, INC., Debtor. ROBERT YAQUINTO, JR., TRUSTEE FOR CARAVAN REFRIGERATED CARGO, INC., Plaintiff, vs. SUPREME BEEF PROCESSORS, INC., Defendant — Bankruptcy Case No. 383-0-1146-M; Adversary No. 385-3755)

Now on this 25th day of June, 1987, came on for consideration Defendant Supreme Beef Processors, Inc.'s Motion To Transfer To The Interstate Commerce Commission and Plaintiff Robert Yaquinto, Jr., Trustee for Caravan Refrigerated Cargo, Inc.'s Opposition thereto.

Having considered said Motion and brief in supporting thereof, Plaintiff's opposition thereto, and oral argument, the Court finds that a jury has been demanded and that the Interstate Commerce Commission's findings would be advisory only, and would not, in all likelihood, ever reach the jury. Therefore, to defer to the Interstate Commerce Commission would merely delay the resolution of this matter.

The Court further finds that deferral to the Interstate Commerce Commission could delay ultimate resolution of this matter a considerable period of time; this case is the last matter to be wound up in the Caravan estate, which has been pending since August 30, 1983.

Accordingly, it is ORDERED that Defendant's Motion be and is hereby DENIED.

/s/ Judge Robert C. McGuire

# APPENDIX G

## (A)

## CASES REFERRED BY COURT DECISION TO THE INTERSTATE COMMERCE COMMISSION FOR DECISION ON ISSUES OF UNREASONABLENESS OF MOTOR CARRIER PRACTICES INVOLVING MISREPRESENTATION OF RATES (1984 TO PRESENT)

| *ICC DOCKET NO.* | *SHIPPER(S)* |
|---|---|
| MC-C-10867 | Lady Carol Dresses<br>Lady Carol Petites<br>Lorac Originals<br>Rhapsody Blouse |
| MC-C-10928 | Boise Cascade Corp. |
| MC-C-10961 | Primary Steel, Inc. |
| MC-C-10962 | TMBR Drilling |
| MC-C-10970 | Earle Jorgensen |
| MC-C-10983 | Fort Howard Paper |
| MC-C-10988 | Toastmaster, Inc. |
| MC-C-10989 | Cooper Industries |
| MC-C-10991 | Wakefern Food Corp. |
| MC-C-10995 | Anderson, Clayton Co.<br>Anderson Bros. |
| MC-C-30005 | Sovereign Oil Co. |
| MC-C-30007 | Auto Specialties Manufacturing Co.<br>Bendix<br>GAF<br>Markel<br>Commonwealth Glass Products |

| ICC DOCKET NO. | SHIPPER(S) |
|---|---|
| MC-C-30013 | A. J. Hollander |
| | A & A International |
| | Allen Sugar Company |
| | Banks Lumber Company |
| MC-C-30013 | Becor Western, Inc. |
| | Border Truck Brokerage |
| | The Burke Company |
| | Central Beef Corp. |
| | Central National Gottesman |
| | Cleveland Steel |
| | ConAgra, Inc. |
| | Dinner Bell Foods, Inc. |
| | Feuer Leather Corp. |
| | Forman Distributing Company |
| | Frank J. Schwab Associates |
| | Nestle Enterprises |
| | Furman Lumber, Inc. |
| | International Minerals |
| | J & M Sales |
| | M. Aschheim Company |
| | Moller Steamship Co. and Maersk Lines Limited |
| | Marie's Refrigerated Dressings |
| | Ply-Gem Manufacturing Corp. |
| | Quemetco, Inc. |
| MC-C-30013 | Quin-T Corporation |
| | Southern Ohio Beef Inc. |
| | SKF Industries, Inc. |
| | Stauffer Chemical Company |
| | Tarkett, Inc. |
| | Thypin Steel Company |
| | Twin City Hide, Inc. |
| | Wheeling Brake Block |

| ICC DOCKET NO. | SHIPPER(S) |
|---|---|
| MC-C-30014 | Von Hoffman Press |
| MC-C-30015 | Freeman Products |
| MC-C-30017 | Trailer Marine Transport Corp. |
| MC-C-30019 | Baldor Electric |
| MC-C-30021 | Sewell Plastics |
| MC-C-30022 and 30023 | Artex International<br>Bryan Foods, Inc. |
| MC-C-30025 | Manufacturers Consolidation Service, Inc. |
| MC-C-30026 | Caloric Corporation |
| MC-C-30027 | Sewell Plastics |
| MC-C-30032 | Mitchell Milling |
| MC-C-30034 | Don Fisher Sales |
| MC-C-30039 | Bruard's, Inc. |
| MC-C-30040 | Dennis Klein |
| MC-C-30041 | Spectro Alloys |
| MC-C-30043 | Sipi Metals Corp. |
| MC-C-30051 | Continental Holding Corp. |
| MC-C-30054 | Injected Rubber |
| MC-C-30055 | Commercial Cold Storage, Inc. |
| MC-C-30056 | Otis Elevator |
| MC-C-30058 | Pickwick Internat'l<br>Musicland Group |
| MC-C-30059 | Bunge Edible Oil |

| ICC DOCKET NO. | SHIPPER(S) |
|---|---|
| MC-C-30060 | Aeroquip Corp. |
| MC-C-30061 | Hiram Walker |
| MC-C-30062 | American Industries |
| MC-C-30063 | W. R. Grace & Co. |
| MC-C-30064 | Conagra Poultry |
| MC-C-30066 | Synthetic Products |
| MC-C-30069 | Yangming Marine Line, et al. |
| MC-C-30072 | E. L. Mustee & Sons |
| MC-C-30075 | Fort Howard Paper |
| MC-C-30076 | Ottawa Strong<br>Sherex<br>Caterpillar |
| MC-C-30077 | Fleming-Potter<br>Morton Metalcraft |
| MC-C-30077 | Baldor Electric |
| MC-C-30078 | Mever Products Div. |
| MC-C-30079 | Johanson Transp. |
| MC-C-30080 | Ampad Corporation |
| MC-C-30081 | Orval Kent Food |
| MC-C-30082 | Marine Lumber Co.<br>Weverhaeuser Co. |
| MC-C-30083 | Rubbermaid |
| MC-C-30084 | Delaware Valley |
| MC-C-30085 | Alex Foods, Inc. |

| *ICC DOCKET NO.* | *SHIPPER(S)* |
|---|---|
| MC-C-30087 | Goodmark Foods |
| MC-C-30088 | Royal Oak |
| MC-C-30089 | Anchor Glass Cont. |
| MC-C-30095 | General Mills |
| MC-C-30096 | Star Bronze |
| MC-C-30105 | Ideal Chem. Co. |
| MC-C-30106 | Fisher Mills, Inc. |
| MC-C-30107 | Iron Mountain Ore Co. |
| MC-C-30110 | Stanek Distribution Co. |
| MC-C-30106 | Navistar |
| MC-C-30120 | Zeidel Explorations |
| MC-C-30122 | Georgia Freight Bureau |
| No. 40059 | Zenith Electronics |
| No. 10942 | Atlas Foundry & Machine Company |
| No. 10951 | Liberty Liquors Co. |
| No. 10953 | Anderson Clayton |
| No. 30000 | Zayre Corp. |
| No. 30008 | Ron Miller Assoc. |
| No. 30010 | Kaiser Aluminum & Chemical Corp. |
| No. 30024 | Columbian Rope Co. |
| No. 30045 | Gencorp, Inc. |
| No. 30046 | Product Components, Inc. |

| ICC DOCKET NO. | SHIPPER(S) |
|---|---|
| No. 30048 | Lucky Stores, Inc. |
| No. 30071 | W. A. Krueger Co. |
| No. 30074 | J. W. S. Delavau Co., et al. |
| No. 30100 | Ottawa Strong & Strong, Inc. |
| No. 30103 | Transpo International, Inc. |
| No. 30109 | KR Newsprint Co., et al. |
| No. 30112 | Georgia Freight Bureau, Inc. |
| No. 30115 | MCI Telecommunications Corp. |
| No. 30124 | The Pillsbury Company |
| No. 30127 | Farrell-Calhoun Paint, Inc. |
| No. 30130 | Sunwise Corp. |
| No. 30133 | Manville Sales Corp. |
| No. 30134 | Thomas J. Lipton, Inc. |
| No. 30137 | B & B Beverage Co. |
| No. 30139 | Ideal Chemical & Supply Company |
| No. 30140 | Sunshine Mills, Inc. |
| No. 30143 | Utica Packing Co.,<br>Theodoredis & Sons, Inc. |
| No. 30148 | Falcon Transport, Inc. |

**(B)**

**EXAMPLES OF REPORTED COURT DECISIONS REFERRING CASES TO THE INTERSTATE COMMERCE COMMISSION FOR DECISION ON ISSUES OF UNREASONABLENESS OF MOTOR CARRIER PRACTICES INVOLVING MISREPRESENTATION OF RATES**

ARKANSAS: *Rebel Motor Freight* v. *Specialty Oil Company*, LR-C-87-565, E.D. AR W.D. 10/14/88 (¶ 83,316)[1]

D.C.: *Maislin Transport* v. *House of Wines*, C.A. No. 84-2831 (D.DC June 2, 1987) (¶ 83,316)

COLORADO: *Delta Traffic Services* v. *Marine Lumber Company*, 483 F.Supp. 734 (D.Colo. 1987)

GEORGIA: *Delta Traffic Services (Oneida)* v. *Knight-Ridder Newspaper Sales, Inc.*, 691 F.Supp. 339 (N.D.Ga 1988)

ILLINOIS: *In re Tobler Transfer Bankr. Christison, Trustee* v. *Caterpiller*, No. 85-00596 74 B.R.373 (Bankr. C.D. IL May 29, 1987)

LOUISIANA: *Rebel Motor Freight, Inc.* v. *Southern Beverage Co., Inc.*, C.A. No. 87-261-B (M.D. LA October 6, 1987); 673 F.Supp. 785 (M.D. LA 1987) (¶ 83,363)

MICHIGAN: *In re: Tucker Freight Lines, Tucker* v. *United Exposition*, (Dist. Ct. affirmed Bankr. Ct. referral to ICC, April 14, 1988), Bky. No. HK 83-2391, Adv. No. 85-0631, 85 Bankr. 426; D.C. W.D. Mich., April 14, 1988 (¶ 83,400)

NEW JERSEY: *Oneida* v. *The Ormond Shops, et al.*, No. 85-03606, Adv. No. 87-0527 et al., Bankr. Ct. NJ, February 17, 1989 (reversing prior denial at ¶ 83,425)

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[1] "¶" references are to MOTOR CARRIER CASES (CCH).

NORTH CAROLINA: *Motor Carrier Audit & Collection Co. (RTC)* v. *Family Dollar Stores*, 670 F. Supp. 644 (W.D. NC 1987)

OKLAHOMA: *In re: Amarex, Inc.*, 74 Bankr. 378 (Bankr. W.D. Okla 1987)

PENNSYLVANIA: *Breman's Express Co.* v. *Don Fisher Sales, Geneo, H. & H., Distrib. Co. Metalchem, Inc., Pryor Corp., Sorce, Inc. & Tile City of PA*, Bankr. W.D.PA, 69 B.R. 356, January 14, 1987 (¶ 83,299), MC-C-30034, April 14, 1988

*Breman's Exp.* v. *Mitchell Milling, et al.* (Affirming ICC decision, October 13, 1988 ¶ 83,416), 69 B.R. 356 (Bankr. W.D.PA 1987) Bky. No. 84-092, Adv. 86-053, MC-C-30032, October 14, 1987

WISCONSIN: *G. M. W. Inc.* v. *Flambeau Paper Corp.*, No. 85-C-339-S (W.D. WI December 9, 1985) (¶ 83,248)

(C)

**COURT DECISIONS ADOPTING INTERSTATE COMMERCE COMMISSION FINDINGS OF UNREASONABLENESS OF MOTOR CARRIER PRACTICES INVOLVING MISREPRESENTATION OF RATES FOLLOWING REFERRAL**

*Younger Transportation, Inc.* v. *TMBR Drilling, Inc.*, No. MO-85-CA-20 (W.D. Tex., September 23, 1987)

*Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, No. 85-0021 (W.D. Mo., July 22, 1988) (1988 U.S. Dist. LEXIS 10550)

*Maislin Industries, U.S., Inc.* v. *A. J. Hollander, et al., Adv. No. 85-0076, et al.* (Bktcy, E.D. Mich., December 9, 1988) (41 cases)

*Orr* v. *ICC*, 703 F. Supp. 676 (W.D. Tenn., 1988)

*Delta Traffic Services* v. *Marine Lumber Co.*, No. 86-1124-MA (D. Or., January 24, 1989)

*Breman's Express* v. *Mitchell Milling, et al.* (1989 Fed. Car. Cases ¶ 83,439) (Bktcy. W.D. Pa., 1988)

*Orscheln Bros. Truck Lines* v. *Toastmaster, Inc.* (1989 Fed. Car. Cases ¶ 83,439) N.D. Ill., 1988)

# APPENDIX H

## (A)

## COURT DECISIONS *DENYING* REFERRAL OF UNREASONABLE PRACTICE ISSUES TO THE INTERSTATE COMMERCE COMMISSION INVOLVING MISREPRESENTATION OF RATES

CALIFORNIA: *West Coast Truck Lines* v. *Kaiser Aluminum & Chemical*, No. C-87-0048 (N.D. CAL July 28, 1987) (¶ 83,336)[1]

*Milne Truck Lines & Consolidated/Mark* v. *American Licorice Co.*, C-88-1420 DLJ, D.C. N.D. Cal., December 23, 1988

*Wescar Freight Systems* v. *Conagra, Inc.*, C-88-4664 SAW, D.C.N.D. Calif. January 26, 1989

COLORADO: *Motor Carrier Audit & Collection (Transpo. Int'l)* v. *United Food Service*, CA No. 87-C-298 (D COLO. May 4, 1987) (1987 U.S. Dist. LEXIS 13659) ¶ 83,326

CONNECTICUT: *Oneida Motor Freight Inc., Debtor and Delta Traffic Service, Inc.* v. *Georgia Pacific Corp.*, — B-87-482 (D CT. December 2, 1987) (¶ 83,393) 684 F.Supp. 769

*Delta Traffic Services (Oneida MF)* v. *Cuisinarts, Inc.*, CA-H-87-424 (AHN) (D.Conn. October 28, 1987)

*Delta Traffic Services and Campbell 66 Express* v. *Purdue Frederick Co.*, Civ. No. B-88-196 (W.W.E.), D. Conn., March 8, 1989

GEORGIA: *Feldspar Trucking Company* v. *Greater Atlanta Shippers Assn.*, No. C-87-575A, (ND GA Atl. Div. September 29, 1987), 683 F.Supp. 1375 (1987 Aff'd, 11th C.A. July 20, 1988) (¶ 83,397)

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[1] "¶" references are to MOTOR CARRIER CASES (CCH).

ILLINOIS: *Motor Carrier Audit & Collection* v. *Casio,* CA No. 6124 (N.D. IL October 27, 1987)

*Motor Carrier Audit Collection* v. *Medline Ind.*, CA No. 6123 (N.D. IL November 2, 1987)

*Motor Carrier Audit Collection* v. *Portion Packaging, Inc.*, CA No. 87-C-6108 (N.D. Ill. April 22, 1988)

*Motor Carrier Audit Collection* v. *C&D Charter Power Sys.*, No. 88-C-3161 (N.D. Ill. October 27, 1988)

*Transpo. Int'l.* v. *Bunge Edible Oil Corporation,* No. 86-C-9330 (N.D. Ill. May 11, 1987, aff'd. 87-1907, 7th Cir. July 27, 1987)

MICHIGAN: *IMFS, Inc.* v. *Nekoosa Papers, Inc.*, No. G86-355 (W.D. Mich., August 28, 1986)

MISSOURI: *Campbell 66* v. *Transcrit Corp.*, 86-01697-S-1-11, 88-205-S-1-11, June 1, 1988

MINNESOTA: *Total Transportation, Inc.* v. *Armour & Co.*, Bky 4-85-1909, Adv. 4-87-233, (D. Minn., 4th Div.), March 18, 1988 84 Bankr. 5909 (¶ 83,369)

v. *Portion Packaging, Inc.*, C.A. No. 6108, N.D. IL, E. Div. April 22, 1988

v. *BTS Transport. Services,* Adv. 4-87-269 (April 8, 1988) (¶ 83,370)

v. *Land O'Lakes, Inc.*, Adv. 4-87-227, Bky. Ct. Minn., August 23, 1988 (¶ 83,403)

v. *Assoc. Milk Producers,* Adv. 4-87-215 + 276, B.C.D.Minn. May 11, 1988 (¶ 83,373)

*Indianhead Truck Lines* v. *Miles Home Div. of Insileo,* Bky 4-84-2291, Adv. No. 4-86-325, B.C. Minn., September 15, 1987 (¶ 83,372)

MISSISSIPPI: *Delta and Dudley Trucking Company* v. *Armstrong World Industries,* CA No. J88-0099, S.D. Miss., Jackson Div., November 4, 1988

NEW JERSEY: *Oneida Motor Freight Inc., Debtor and Delta Traffic Service, Inc.* v. *Felsway Corp.*, Adv. No. 87-0513

v. *C&A Wallcoverings* — 87-0661

v. *The Ormond Shops* — 87-0627

(Bankr. NJ October 19, 1987) (¶ 83,346)

*Oneida Motor Freight Inc., Debtor and Delta Traffic Service, Inc.* v. *Ormond Shops*, Adv. No. 87-0527

v. *Thomas J. Lipton*, Adv. No. 87-0642

v. *Lionel Leisure*, Adv. No. 87-0664

v. *C&A Wallcovering*, Adv. No. 87-0661

(Bankr. Ct., D.NJ September 29, 1988) (¶ 83,425); Reversed on reconsideration and referred to ICC, February 17, 1989

NEW YORK: *Delta Traffic Service & Oneida MF* v. *Appco Paper & Plastics Corp.*, CV-87-2325, E.D.N.Y., November 2, 1988 (1988 U.S. Dist. LEXIS 13306) (¶ 83,426) (Appeal Pending, 2nd Cir. Docket No. 88-9057)

*Delta Traffic Service (Oneida)* v. *Coffee Holding Co.*, 87 CV2011, E.D. N.Y., June 3, 1988 (¶ 83,394)

NORTH CAROLINA: *In re: Carolina Motor Express Inc., Langdon M. Cooper, Trustee and Mark and Assoc. of NC* v. *California Consolidated Ent.* — Adv. No. 86-0498 (Bankr. W.D.N.C. March 25, 1987) 78 BR.773

*McLean Trucking Co.* v. *Allied Business Forms*, C-B-86-023, Adv. 88-042, (Bankr. W.D. N.C., Charlotte Div.), April 28, 1988 (¶ 83,378)

*Observer Transp.* v. *Service Merchandise*, No. C-C-87-196-P, D.C. W.D. NC, Charlotte Div., May 16, 1988 (¶ 83,418)

OHIO: *Delta Traffic Service, Inc. (Oneida Motor Freight)* v. *E. L. Mustee & Sons*, N.C. Ohio, E. Div., CA No. C87-1737, May 12, 1988

*Delta Traffic Service (Campbell 66)* v. *Sun Chemical Dispersions Div.*, C-1-88-409, September 14, 1988, D.C.S.D. Ohio, W.Div. (¶ 83,415)

*Delta Traffic Service (Oneida)* v. *The Lincoln Electric Co.*, C-87-1744, N.D. OH, June 15, 1988

OREGON: *Silver Wheel Freight Line* v. *AT&T Tech.* — Bankr. No. 382-03558-S7, Adv. No. 85-0743-S (D. OR October 23, 1986)

PENNSYLVANIA: *Oneida Motor Freight, Inc., Debtor and Delta Traffic Service, Inc.* v. *Occidental Chem.*, No. 85-03606, — Adv. No. 87-4217 (E.D. PA, August 18, 1987) (¶ 83,381)

v. *Keystone Lighting* — 87-3659 (E.D. PA, September 23, 1987)

v. *Pride Health Care* — 87-0915 (M.D. PA, November 18, 1987)

*In re Taynton Freight Systems* v. *Tripar Transp.*, No. 5-87-0080 (M.D. PA August 14, 1987)

*Halls Motor Lines* v. *I.B.M.*, CA 88-0717, February 22, 1989

TENNESSEE: *Delta (Campbell 66)* v. *Madison Mills*, No. 3-88-0315, December 22, 1988

TEXAS: *Robert Yaquinto Jr., Trustee for Caravan Refrigerated Cargo, Inc.* v. *Supreme Beef Processors, Inc.*, CA 3-87-2274-R (D.ND. TX Dallas Div. January 30, 1988)

*Delta Traffic Service (One-Way Cartage System)* v. *Texas Cartage Terminal Warehouse*, N.D. TX, Dallas Div. CA 3-86-2904-D, June 2, 1988 (¶ 83,384)

UTAH: *Delta Traffic Service* v. *Sysco Intermountain Food Service*, CA No. 87-C-0345 (C. D. Utah October 30, 1987) (After Trial on the Merits, Ct. dismissed the complaint, March 27-30, 1989, Written Opinion to follow)

WISCONSIN: *G.M.W. Inc.* v. *Certified Parts Corp.*, No. 86-1086 (D. WI December 18, 1986) 135 Wis. 2d 503, 400 NW 2d 512 (C.T. App. 1986)

**(B)**

**COURT DECISIONS REJECTING ICC FINDINGS OF UNREASONABLE PRACTICES INVOLVING CARRIER MISREPRESENTATION AS NON-BINDING**

*INF, Ltd.* v. *Spectro Alloys Corp.*, 690 F. Supp. 808 (D. Minn., 1988)

*Delta Traffic Service, Inc.* v. *Synthetic Products Co.*, (1988 Fed. Car. Cases ¶ 83,408) (N.D. Ohio, 1988)

*Pongetti* v. *Baldor Electric Co., et al.* (1988 Fed. Car. Cases ¶ 83,399) (Bktcy, N.D. Miss., 1988) (3 cases)

*Motor Carrier Audit & Collection Co.* v. *Baldor Electric Co.*, No. CA3-85-2002R (N.D. Tex., July 27, 1988)

*Orscheln Bros. Truck Lines* v. *Zenith Electric Corporation* (1989 Fed. Car. Cases ¶ 83,428) (N.D. Ill., 1988)

Supreme Court, U.S.
FILED
JUN 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1958

In The

# Supreme Court of the United States

October Term, 1988

SUPREME BEEF PROCESSORS, INC.,

*Appellant,*

v.

ROBERT YAQUINTO, JR., TRUSTEE FOR CARAVAN REFRIGERATED CARGO, INC.,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LOUIS J. WADE
*Counsel of Record*
CULP & WADE
1627 Main, Suite 404
Kansas City, Missouri 64108
(816) 842-2999

ROBERT YAQUINTO, JR.
SHERMAN AND YAQUINTO
509 N. Montclair
Dallas, Texas 75208
(214) 942-5502

*Counsel for Respondent*

June 29, 1989

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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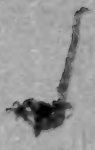

# TABLE OF CONTENTS

Page

Table of Contents ..... i

Table of Authorities ..... ii

Statutes Involved ..... 1

Statement of the Case ..... 2

Reasons Why Writ Should Be Denied ..... 3

A. Summary of Argument ..... 3

B. Collection of Undercharges by a Motor Carrier as Required by the Interstate Commerce Act Cannot Constitute an Unreasonable Practice, and Does Not Fall within the Primary Jurisdiction of the Interstate Commerce Commission ..... 5

1. Standard of Review ..... 5

2. Statutory Foundation ..... 6

3. Authority from this Court ..... 6

4. Courts of Appeal Decisions ..... 10

5. *Seaboard* Consistent with Decision Below ..... 10

6. *Western Pacific* Consistent with Decision Below ..... 12

7. Cases Omitted by Petitioner ..... 12

C. Government Exemption Claim Unavailing ..... 14

Conclusion ..... 15

## TABLE OF AUTHORITIES

Page

COURT CASES:

*A.,T. & S.F. Ry Co. v. Robinson*, 233 U.S. 173 (1914) .... 16

*Buckeye Cellulose Corp. v. L & N Railroad Company*, 1 I.C.C.2d 767 (1985), *Aff'd Sub. Nom. Seaboard System Railroad v. United States*, 794 F.2d 635 (11th Cir. 1986) ..... 4, 10, 11

*Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, 52 S.Ct. 443, 76 L.Ed. 815 (1932) ..... 16

*Consolidated Freightways v. Terry Tuck, Inc.*, 612 F.2d 465 (9th Cir.), *cert. denied*, 447 U.S. 907 (1980) ..... 10

*Empire Petroleum Co. v. Sinclair Pipeline Co.*, 282 F.2d 913 (10th Cir. 1960) ..... 10, 16

*Frito-Lay of Puerto Rico, Inc. v. Canas*, 92 F.R.D. 384 (D.P.R. 1981) ..... 15

*Illinois Central Gulf Railroad Co. v. Golden Triangle Wholesale Gas Company*, 586 F.2d 588 (5th Cir. 1978) ..... 10

*Jensen v. Conrad*, 570 F.Supp. 114 (D.S.C. 1983), *cert. denied*, 470 U.S. 1052, 105 S.Ct. 1754, 84 L.Ed.2d 818 (1985) ..... 15

*Johnson v. Heckler*, 607 F.Supp. 875 (N.D.Ill. 1984) .... 14

*Keogh v. Chi. & N.W.R. Co.*, 260 U.S. 156, 43 S.Ct. 47 (1922) ..... 16

*Louisville and Nashville Railroad Co. v. Central Iron and Coal Co.*, 265 U.S. 59, 44 S.Ct. 441, 68 L.Ed. 900 (1924) ..... 3

*Louisville and Nashville Railroad Co. v. Maxwell*, 237 U.S. 94, 35 S.Ct. 494, 59 L.Ed. 853 (1915) ..... 6

*Louisville and Nashville Railroad Co. v. Mead Johnson and Company*, 737 F.2d 683 (7th Cir.), *cert. denied*, 469 U.S. 982, 105 S.Ct. 386, 83 L.Ed.2d 320 (1984) .... 10

TABLE OF AUTHORITIES – Continued

Page

*Miller v. Ideal Cement Co.*, 214 F.Supp. 717 (D.Wyo. 1963) ..... 16

*Nyad Motor Freight, Inc. v. W. T. Grant Co.*, 486 F.2d 1112 (2d Cir. 1973) ..... 10

*Regular Common Carrier Conference, et al. v. United States*, 793 F.2d 376 (D.C.Cir. 1986) ..... 13, 14

*Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336, 102 S.Ct. 1815, 72 L.Ed.2d 114 (1982) ..... 7, 13

*Southern Pacific Transportation Co. v. Miller Abattoir Co.*, 454 F.2d 357 (3rd Cir. 1972) ..... 10

*Southern Pacific Transportation Co. v. San Antonio, Texas*, 748 F.2d 266 (5th Cir. 1984) ..... 10

*Square D Co. and Big D Building Supply Corp. v. Niagara Frontier Tariff Bureau, et al.*, 476 U.S. 409, 106 S.Ct. 1922, 90 L.Ed.2d 413 (1986) ..... 8, 9, 16

*Thermo King v. Strick Corp.*, 467 F.Supp. 75 (W.D.Pa.), *Aff'd*, 609 F.2d 503 (3rd Cir. 1979) ..... 15

*Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 103 S.Ct. 1343, 75 L.Ed.2d 260 (1983) ..... 7

*United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956) ..... 4, 12

STATUTES

49 U.S.C. §10701 ..... 9

49 U.S.C. §10761(a) ..... 1, 3, 4, 6

49 U.S.C. §10762 ..... 1, 3, 6

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

U.S. Constitution, Article I, Section 8, Clause 3..... 2

Federal Rules of Civil Procedure, Rule 59..... 14

Supreme Court Rules, Rule 17(a).....4, 5

MC-177, *National Industrial Transportation League, Petition to Institute Rulemaking* ..... 9

House Report 96-1069, 96th Cong. 2nd Sess. 12, reprinted in 1980 *U.S. Code, Cong. and Admin. News* 2282, 2307 ..... 10

## STATUTES INVOLVED

### § 10761. Transportation prohibited without tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

### § 10762. General tariff requirements

(a)(1) A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle . . .

## STATEMENT OF THE CASE

Prior to the filing of its bankruptcy, Caravan Refrigerated Cargo, Inc. ("Caravan") was a motor common carrier for hire operating pursuant to a certificate of public convenience and necessity issued by the Interstate Commerce Commission ("ICC"). Caravan operated under Title 49 of the United States Code which governs transportation in interstate commerce. Congress has preempted and exclusively regulates the field of interstate commerce pursuant to United States Constitution Article I, Section 8, Clause 3. Congress has passed statutes, from time to time, relating to transportation and now recodified in Title 49 U.S.C. as Sections 10101, *et. seq.*

Robert Yaquinto, Jr. ("Trustee") constitutes the duly qualified and legally appointed trustee for the Caravan bankruptcy estate. The Trustee is required to collect all assets of the estate and distribute the same in accordance with the bankruptcy code priorities. In fulfillment of those responsibilities, Trustee filed suit to collect sums due from Supreme Beef Processors, Inc. ("Petitioner") by filing an adversary action in the Bankruptcy Court on August 29, 1985. Ultimately, the adversary action was transferred to the District Court for the Northern District of Texas where the Honorable Jerry Buchmeyer, District Judge, upon cross-motions for summary judgment, the first of which was filed by Petitioner, granted summary judgment in favor of Trustee and against Petitioner. Petitioner's request for reconsideration in the District Court was denied.

Petitioner appealed to the Fifth Circuit Court of Appeals. The Fifth Circuit rendered its opinion on February 2, 1989, unanimously affirming the decision of the District Court. Upon request by Petitioner for rehearing or *en banc* consideration, the Fifth Circuit unanimously rejected any further consideration, denied rehearing and denied *en banc* consideration. Petitioner now seeks a writ of certiorari from this court to review the final opinion of the Fifth Circuit.

## REASONS WHY WRIT SHOULD BE DENIED

### A. Summary of Argument

This matter presents a simple, straightforward negotiated rate case. Caravan quoted and billed and Petitioner paid sums for interstate transportation which were not in accordance with rates duly on file with the ICC. Pursuant to the judgment of the District Court and affirmed by the Fifth Circuit, Trustee is entitled to recover the undercharges. The statutes mandate that a common carrier charge and collect only the tariff rate. This long-established, well-entrenched doctrine is often referred to as the "Filed Rate Doctrine" or "Filed Tariff Doctrine". The Filed Rate Doctrine has often been recognized by this court. In 1924 this Court reiterated the Filed Rate Doctrine in *Louisville and Nashville Railroad Co. v. Central Iron and Coal*, 265 U.S. 59, 44 S.Ct. 441, 68 L.Ed. 900 (1924). The Filed Rate Doctrine is based upon the provisions of the Interstate Commerce Act which are now found at 49 U.S.C. 10761(a) and 10762. This court has never altered its view that the Filed Rate Doctrine compels payment of the tariff charges under any circumstances. Likewise, the statutory

foundation for the Filed Rate Doctrine has never been changed. In fact, when Congress carefully reexamined this area of the law in 1980, the Filed Rate Doctrine was reenacted as Section 10761(a). No Circuit Court of Appeals has ever ruled that the Filed Rate Doctrine should be held subservient to a quoted or negotiated rate.

Although not explicitly, Petitioner apparently relies upon Supreme Court Rule 17(a) in seeking certiorari. Petitioner asserts that there is a conflict among the circuits based upon the decision in *Buckeye Cellulose Corp. v. L & N Railroad Co.*, 1 I.C.C.2d 767 (1985), *Aff'd Sub. Nom. Seaboard System Railroad v. United States*, 794 F.2d 635 (11th Cir. 1986) ("*Seaboard*"). Petitioner also asserts an inconsistency with this court's ruling in *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956).

Petitioner incorrectly asserts that there is a conflict with the *Seaboard* case. As the Fifth Circuit indicated, the *Seaboard* case is not a case of a quoted rate versus a published rate, but instead, a case of two rates which were published in a tariff, but unclear to the ordinary user. Therefore, the higher rate could not be used under the rule of construction that ambiguity or unclarity in the tariff shall result in application of the lower rate.

Likewise, this court's ruling in *Western Pacific* is not inconsistent with the Filed Rate Doctrine. This court held in *Western Pacific* that the ICC's primary jurisdiction must be invoked where technical issues are involved. In *Western Pacific*, the specific commodity being shipped was not listed in any tariff. Thus, the technical expertise of the

ICC was required to determine which of two similar, though not exact, commodity descriptions should apply to those shipments.

Petitioner also relies upon a purported exception for government traffic. The district court and Court of Appeals both correctly rejected that argument for two reasons. First, the argument was not timely raised. Second, on its merits, the argument fails for lack of factual support.

Lacking any conflict among the circuits, certiorari should be denied.

### B. Collection of Undercharges by a Motor Carrier as Required by the Interstate Commerce Act Cannot Constitute an Unreasonable Practice, and Does Not Fall within the Primary Jurisdiction of the Interstate Commerce Commission.

#### 1. Standard of Review

In determining whether certiorari should be granted, this court's standard is embodied in Rule 17. The only portion of that rule which is potentially applicable, based upon Petitioner's brief, is contained in Subsection (a) regarding a conflict among the circuits. As will be shown below, no conflict among the circuits exists, and thus certiorari must be denied.

Petitioner's brief in its first two questions presented, essentially raises one question. That question is more appropriately stated above. The ICC may not, under the guise of primary jurisdiction, overrule the Filed Rate Doctrine on a case-by-case basis.

### 2. Statutory Foundation

Pursuant to its Constitutional authority, the Congress has occupied and preempted the field of interstate commerce regulation. Congress has exercised its authority by passage of the Interstate Commerce Act, including Sections 10761(a) and 10762. Those sections form the foundation of the Filed Rate Doctrine. Section 10761(a) provides as follows:

> Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. *That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.* (Emphasis added.)

Section 10762 provides, in pertinent part, as follows:

> . . . A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle.

These sections and their predecessor sections, require that a carrier charge and collect only those amounts which are contained in the tariff.

### 3. Authority from this Court

In the seminal case on this issue, *Louisville and Nashville Railroad Co. v. Maxwell*, 237 U.S. 94, 35 S.Ct. 494, 59 L.Ed. 853 (1915), this court specifically stated that

"deviation from it [the tariff] is not permitted upon any pretext". 35 S.Ct. at 495. This court acknowledged that harsh results may sometimes occur, and that unfairness may seem to result, however, the rule of law is established by Congressional enactment and this court has affirmed that rule of law.

In more recent years, this court has considered the Filed Rate Doctrine in several other contexts. For example, in *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336, 102 S.Ct. 1815, 72 L.Ed.2d 114 (1982), this court considered deviation from credit regulations as a defense to a carrier's suit for collection of its full tariff charges. This court there held that *no* action on the part of the carrier could prevent collection of the tariff charges and affirmed the Filed Rate Doctrine, stating as follows:

> It is perhaps appropriate to note that a carrier has not only the right but also the duty to recover its proper charges for services performed.

102 S.Ct. at 1821. Thus, the carrier's violation of regulations provided no defense to the shipper. The tariff rate must be paid. Policing the carrier is up to the ICC's administrative arm. 102 S.Ct. at 1823-4.

A year later, this court considered the Filed Rate Doctrine in a slightly different context. In *Thurston Motor Lines, Inc. v. Jordan K. Rand., Ltd.*, 460 U.S. 533, 103 S.Ct. 1343, 75 L.Ed.2d 260 (1983), this court considered the jurisdictional foundation for an action to collect undercharges (identical to Trustee's claim). This court reasoned that an action to collect undercharges, being based upon the statutes previously cited herein, constitutes a federal

question, and *not* a contract action. This fact is extremely important. This court found that the charges are *not* a matter of contract, but instead, are a matter of law which apply regardless of any understandings to the contrary, be they reasonable or not. Thus, this court again confirmed the superiority of the Filed Rate Doctrine over any "agreed" or "negotiated" rate.

Most recently, this court considered the Filed Rate Doctrine in the context of antitrust exemption in *Square D Co. and Big D Building Supply Corp. v. Niagara Frontier Tariff Bureau, et al.*, 476 U.S. 409, 106 S.Ct. 1922, 90 L.Ed.2d 413 (1986). In *Square D*, this court considered whether a collective rate bureau remains exempt from antitrust authority in light of the 1980 Amendments to the Interstate Commerce Act. After reviewing the longstanding notions of collective rate-making, non-discriminatory pricing and the Filed Rate Doctrine, this court concluded that the changes to the Interstate Commerce Act were not intended to liberalize, modify, annul, waive, or in any way dilute or limit the long-standing interpretation of the law. This Court stated as follows:

> . . . it nevertheless remains true that Congress must be presumed to have been fully cognizant of this interpretation of the statutory scheme, which had been a significant part of our settled law for over half a century, and that Congress did not see fit to change it when Congress carefully reexamined this area of the law in 1980. *Petitioners have pointed to no specific statutory provision or legislative history indicating a specific Congressional intent to overturn the long-standing Keogh construction; harmony with the general legislative purpose is inadequate for that formidable task.* (emphasis added).

106 S.Ct. at 1928-29.

Petitioner's argument actually conflicts with this Court's ruling in *Square D*. This Court found a "statement of general legislative purpose inadequate for . . . (the) formidable task" of overruling long-settled policy. *Square D*, 106 S.Ct. at 1928-29. Petitioner's argument relies upon the ICC's self-annointed, expanded area of involvement. *See*, MC-177, *National Industrial Transportation League, Petition to Institute Rulemaking*. That expansion relies upon nothing but a general statement of legislative purpose (49 U.S.C. 10701). The foundation of Petitioner's argument should consist of concrete and steel. Instead, Petitioner's argument and its foundation crumble for lack of substantial footing. In reality, the ICC has bootstrapped its authority by choosing to declare the Filed Rate Doctrine invalid, on a case-by-case basis, pursuant to a general statement of purpose, the very activity this Court declared improper only three (3) years ago.

In fact, this court's uniform interpretation of the Filed Rate Doctrine parallels Congressional intent as expressed in 1980 when the Interstate Commerce Act was revised. In debating the revisions to the Interstate Commerce Act, Congress expressed its intent as follows:

> The thrust of (the new zone of rate freedom subsection) . . . is to provide for more pricing freedom and less government regulation and to balance freer entry into the industry, freer expansion of the industry, and the additional competition that will result from other provisions of the bill. The concept, then, is to spur competition both in service and in pricing . . .
>
> This new latitude carries with it less government involvement, *except in the area of discriminatory and predatory pricing*. In these two areas the Commission's powers remain intact. (emphasis added).

*See*, House Report 96-1069, 96th Cong., 2nd Sess. 12, reprinted in 1980 *U.S. Code, Cong. and Admin. News* 2282, 2307.

### 4. Courts of Appeal Decisions

The Circuit Courts of Appeal have all consistently followed this Court's lead in applying the Filed Rate Doctrine. *See, e.g., Nyad Motor Freight, Inc. v. W. T. Grant Co.*, 486 F.2d 1112 (2nd Cir. 1973); *Southern Pacific Transportation Co. v. Miller Abattoir Co.*, 454 F.2d 357 (3rd Cir. 1972); *Illinois Central Gulf Railroad Co. v. Golden Triangle Wholesale Gas Company*, 586 F.2d 588 (5th Cir. 1978); *Southern Pacific Transportation Co. v. San Antonio, Texas*, 748 F.2d 266 (5th Cir. 1984); *Louisville and Nashville Railroad Co. v. Mead Johnson and Company*, 737 F.2d 683 (7th Cir.), *cert. denied*, 469 U.S. 982, 105 S.Ct. 386, 83 L.Ed.2d 320 (1984); *Consolidated Freightways Corp. v. Terry Tuck, Inc.*, 612 F.2d 465 (9th Cir.), *cert. denied*, 447 U.S. 907 (1980); *Empire Petroleum Co. v. Sinclair Pipeline Co.*, 282 F.2d 913 (10th Cir. 1960).

In *Consolidated Freightways* and *Mead Johnson*, this court denied certiorari. No reason existed for review of those cases, nor does any reason exist for review of this case.

### 5. *Seaboard* Consistent with Decision Below.

Petitioner argues that the Eleventh Circuit ruling in *Seaboard* conflicts with the Fifth Circuit's decision. Petitioner misses the point of *Seaboard*. As the Fifth Circuit opinion stated, the *Seaboard* case in fact is quite consistent with the Fifth Circuit opinion.

The Filed Rate Doctrine assumes that a rate is published which any shipper might check for its validity. The Eleventh Circuit *explicitly* ruled that the *tariff* (*not* a quoted rate) was "not plain to the ordinary user". 794 F.2d at 637. That ruling was the basis for determining that undercharges could not be collected for the time period during which the shipper and the carrier agreed that the lower of the two rates provided in the tariff should apply. Through semantic sleight of hand Petitioner suggests that the *Seaboard* ruling was not based upon an unclear tariff. A reference to the opinion itself resolves that question. *See*, 794 F.2d at 635 ("The controversy reflects a somewhat unclear published tariff.")

Interestingly enough, the *Seaboard* opinion does not disallow collection of the undercharges after the carrier notified the shipper that a higher rate would apply. In fact, the Eleventh Circuit affirmed a ruling in favor of the carrier for recovery of undercharges for the time period following notification of the increased rate. That decision is entirely consistent with the Filed Rate Doctrine. Once the shipper had clear notice that a higher rate was actually applicable under the tariff, the shipper had to pay the higher rate. Prior to that date, the shipper did not have notice of the higher rate, because the tariff was "unclear".

Thus, *Seaboard* involved the application of one of two rates out of a tariff. The applicable rate could not clearly be determined. Petitioner instead suggests that an unpublished, private agreement as to rate should prevail over the filed rate. *Seaboard* did not so rule, and in fact, ruled quite to the contrary by requiring payment of the filed rate after notice was given to the shipper of a higher applicable rate.

### 6. *Western Pacific* Consistent with Decision Below

Petitioner's reliance on *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956) is misplaced. This Court's decision in *Western Pacific* is consistent with the Fifth Circuit decision.

The doctrine of primary jurisdiction did require referral to the ICC of certain issues in *Western Pacific*. The Court there faced a commodity (steel casings with napalm gel but lacking bursters or fuses) which did not appear in any tariff. Two similar commodities did appear in tariff schedules. To determine whether the steel casings should be rated as "incendiary bombs" or "gasoline in steel casings" required a review of the underlying cost and risk allocation factors which justified each rate. 77 S.Ct. at 168. That determination was sufficiently technical to require resort to the ICC's expertise.

On the other hand, Petitioner asserts that a negotiated rate should prevail over an undisputed, clear tariff. This Court only found primary jurisdiction applicable in *Western Pacific* based on the technical issues. Petitioner presents no technical issues. The decision below, consistent with this Court's other opinions, found as it did because no technical issue was raised. Thus, the Fifth Circuit's opinion conforms to this Court's precedent in *Western Pacific* and the numerous other cases cited herein.

### 7. Cases Omitted by Petitioner

In requesting certiorari, Petitioner failed to direct the court's attention to some highly relevant decisions. The

*Commercial Metals* decision cited above was not mentioned in Petitioner's brief. In *Commercial Metals,* this court held that the "carrier has not only the right but also the duty to recover its proper charges for services performed." 102 S.Ct. at 1821. Trustee here seeks only to comply with that duty.

Likewise, Petitioner failed to mention the decision in *Regular Common Carrier Conference, et al. v. United States,* 793 F.2d 376 (D.C.Cir. 1986). In that case, the D.C. Circuit, consistently with all the other circuits, found that the Filed Rate Doctrine stands supreme. Justice Scalia, author of the opinion, stated, in pertinent part, as follows:

> Even without any clear textual indication, it would be doubtful whether the waiver provision of § 10762 could be used so expansively as to nullify this § 10761 requirement for a "rate . . . contained in a tariff". That requirement is utterly central to the act. Without it, for example, it would be monumentally difficult to enforce the requirement that rates be reasonable and non-discriminatory (citation omitted) and virtually impossible for the public to assert its right to challenge the lawfulness of existing or proposed rates (citation omitted). The matter is placed beyond all doubt, however, by the fact that 10761 contains its own waiver provision, authorizing the Commission to "grant relief from subsection (a) of this section" only "to contract carriers." (Citation omitted.) That explicit limitation would be meaningless if the Commission could effectively dispense with the requirement for a "rate . . . contained in a tariff" by unlimited dilution of the "general tariff requirements" under § 10762.

*Regular Common Carrier Conference,* 793 F.2d at 379. Petitioner would allow unlimited, after-the-fact dilution of the tariff filing requirements. If the ICC determines, on a

case-by-case basis, that collection of the filed rate would be "unreasonable", then the requirement of a "rate . . . contained in a tariff" would be rendered meaningless.

Even more basic is the language quoted by Justice Scalia. Relief from the Filed Rate Doctrine can *only* be granted for contract carriage. 793 F.2d at 379. Petitioner instead seeks authority for the ICC to grant *ex post facto* relief from the Filed Rate Doctrine.

The lesson from *Regular Common Carriers* is quite simple. A negotiated rate cannot be enforced. The ICC cannot lawfully enforce a private agreement which varies from a published tariff. "Reasonability" is not material since all parties knew, or were legally held to know, the lawful rate from the start.

### C. Government Exemption Claim Unavailing

Petitioner also asks this court to review the Fifth Circuit ruling rejecting the untimely claim of government exemption. Petitioner offers no legal support for its argument, except to state that the conclusion is wrong.

Petitioner failed to raise the government exemption argument before its Motion for Reconsideration. The rules of procedure as promulgated by this court are quite explicit on the use of reconsideration. Under Federal Rules of Civil Procedure 59, a party may obtain reconsideration of issues improvidently ruled or arguments based on newly discovered evidence. *Johnson v. Heckler*, 607 F.Supp. 875 (N.D.Ill. 1984). That authority does not extend, however, to raising new issues not previously pled or briefed.

Petitioner had not properly raised the issue, and, in fact, had waived the issue. *Jensen v. Conrad*, 570 F.Supp. 114 (D.S.C. 1983), *cert. denied*, 470 U.S. 1052, 105 S.Ct. 1754, 84 L.Ed.2d 818 (1985) (refusal to alter Summary Judgment because evidence could have been timely submitted but was not so submitted); *Thermo King Corporation v. Strick Corporation*, 467 F.Supp. 75 (W.D.Pa.), *aff'd* 609 F.2d 503 (3rd Cir. 1979) (Summary Judgment for Plaintiff could not be disturbed – Defendant not allowed to shift ground on position regarding determinative value of warranty). As the District Court stated in its opinion on the Motion for Reconsideration, by choosing to withhold this legal theory, Petitioner is bound by its own tactics. *Frito-Lay of Puerto Rico, Inc. v. Canas*, 92 F.R.D. 384, 391 (D.P.R. 1981).

Petitioner cites no conflict among the circuits on this issue. Instead, Petitioner attempts, apparently, to rely upon some notion of plain error. Petitioner, however, cites no authority for the granting of certiorari to review such a ruling.

Furthermore, the district court ruling on this matter was made in the alternative. The district court did consider the merits and found against Petitioner on the merits. *See, Order Denying Reconsideration*, March 4, 1988, Buchmeyer, J., found at Appendix C-1 of Petitioner's Brief. Petitioner fails to address or attack that ruling.

## CONCLUSION

Petitioner stops short of arguing, though clearly hints, that application of the Filed Rate Doctrine would

be unfair. That may or may not be so, however, this court should not change the doctrine which has been so long established. It is "more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil and Gas*, 285 U.S. 393, 406, 5 S.Ct. 443, 447, 76 L.Ed. 815 (1932), quoted in *Square D*, 106 S.Ct. at 1931.

The Filed Rate Doctrine as enacted by Congress and as confirmed by this court requires the carrier to charge and collect the filed rate. No more and no less may be collected. The carrier is under a legal obligation to collect that rate. *No act or omission of the carrier* (even "unreasonable practices") can estop it from collecting the full tariff charges. *Miller v. Ideal Cement Co.*, 214 F.Supp. 717, 720, (D.Wyo. 1963), citing *Empire Petroleum Co. v. Sinclair Pipeline Co.*, 282 F.2d 913 (10th Cir. 1960). "No oral contracts or agreements may supersede or vary the tariff." *Miller*, 214 F.Supp. at 720, citing *A.,T. & S.F. Ry Co. v. Robinson*, 233 U.S. 173, 34 S.Ct. 556, 58 L.Ed. 90 (1914). Yet Petitioner seeks to vary the charges by oral agreement, after-the-fact, under the cloak of "unreasonableness". The carefully constructed regulatory environment cannot be undermined by oral agreements. That is precisely what Petitioner requests. But that is precisely what Congress forbade by enacting the Filed Rate Doctrine.

"The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." *Square D*, 106 S.Ct. at 1926, quoting Brandeis, J in *Keogh v. Chi. & N.W.R. Co.*, 260 U.S. 156, 43 S.Ct. 47, 49 (1922). Petitioner's assertion that Caravan acted "unreasonably" is nothing more than an attempted assertion of a species of tort based on misrepresentation or fraud. Decades old,

unwavering precedent and statute mandate that Petitioner's Arguments and Petition for Writ of Certiorari be denied.

Respectfully submitted,

CULP & WADE

LOUIS J. WADE/MO Bar 29034
1627 Main, Suite 404
Kansas City, Missouri 64108
(816) 842-2999

SHERMAN AND YAQUINTO

ROBERT YAQUINTO, JR.
509 N. Montclair
Dallas, Texas 75208
(214) 942-5502

Supreme Court, U.S.
FILED
JUL 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1958

In The

# Supreme Court of the United States

October Term, 1988

SUPREME BEEF PROCESSORS, INC.,

*Appellant,*

v.

ROBERT YAQUINTO, JR., TRUSTEE FOR CARAVAN REFRIGERATED CARGO, INC.,

*Respondent.*

## ON MOTION FOR LEAVE TO FILE BRIEF FOR AMICUS CURIAE

## BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEFS

Louis J. Wade
*Counsel of Record*
Culp & Wade
1627 Main, Suite 404
Kansas City, Missouri 64108
(816) 842-2999

Robert Yaquinto, Jr.
Sherman and Yaquinto
509 N. Montclair
Dallas, Texas 75208
(214) 942-5502

*Counsel for Respondent*

July 7, 1989

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## OPPOSITION TO MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Four (4) separate organizations have filed Motions for Leave to File an *Amicus Curiae* Brief. Three (3) of the groups have filed a joint Motion and Brief and the fourth group has filed a separate Motion and Brief. Leave to file the *Amicus Curiae* Briefs should be denied.

Pursuant to Supreme Court Rule 36.3, an *Amicus* brief should only be allowed where the interests of the applicant, or questions of law presented by the applicant, have not or will not adequately be represented by the parties to the pending litigation. The proposed *Amicus* briefs present nothing new or different. In fact, appendices C and D in the brief filed by the Shippers National Freight Claims Council, Inc. ("Council") are virtually identical to Petitioner's Appendices G and H. Council's Appendices A and B provide nothing different than what Petitioner has already argued.

The arguments raised by both briefs focus narrowly on the question of unreasonable practices and referral to the ICC. Both briefs argue for referral to the ICC under the doctrine of primary jurisdiction. These arguments simply duplicate the arguments already made, at length, by Petitioner.

Applicants offer no basis for granting the Motions to file *Amicus* Briefs. The Motions for Leave to file *Amicus* briefs should be denied.

CULP & WADE

By: Louis J. Wade/MoBar 29034
1627 Main, Suite 404
Kansas City, Missouri 64108
(816) 842-2999

SHERMAN AND YAQUINTO

By: Robert Yaquinto, Jr.
509 N. Montclair
Dallas, Texas 75208

*Attorney for Respondent*

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TRUSTEE FOR CARAVAN REFRIGERATED CARGO, INC.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## PETITIONER'S REPLY BRIEF

JOHN W. BRYANT
*Counsel of Record*
NEILL T. RIDDELL

EAMES, WILCOX, MASTEJ AND BRYANT
900 Guardian Building
Detroit, Michigan 48226
Telephone: (313) 963-3750

*Counsel for Petitioner*

Dated: July, 1989

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

## TABLE OF CONTENTS

PAGE NO[S].

TABLE OF AUTHORITIES ..... i

ARGUMENT:

I. ADDITIONAL CONFLICT BETWEEN CIRCUITS 1

II. REPLY TO BRIEF OF RESPONDENT ..... 3

CONCLUSION ..... 7

## TABLE OF AUTHORITIES

**COURT CASES:**

*General American Tank Car Corp.* v. *Eldorado Terminal Co.*, 308 U.S. 422 (1939) ..... 6

*Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285 (1922) ..... 6

*Keller Industries, Inc.* v. *U.S.*, 449 F.2d 163 (9th Cir. 1971) ..... 6

*Keogh* v. *Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922) ..... 3

*Louisville & N. R.R. Co.* v. *Maxwell*, 237 U.S. 94 (1915) ..... 3

*Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 705 F. Supp. 1401 (W.D. Mo. 1988) ..... 2

*Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, ___ F.2d ___ (8th Cir. 1989) (Slip opinion, July 17, 1989) ..... 1

*Regular Common Carrier Conference, et al.* v. *United States*, 793 F.2d 376 (D.C. Cir. 1986) .. 5

*Seaboard System R.R.* v. *United States*, 794 F.2d 635 (11th Cir. 1986) ..... 4

PAGE NO[S].

*Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, 360 U.S. 411 (1959) ..... 6

*Square D Co.* v. *Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986) ..... 4, 5

*Texas and P. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) ..... 6

*United States* v. *Western Pacific Railroad*, 352 U.S. 59 (1956) ..... 6

**INTERSTATE COMMERCE COMMISSION DECISION:**

*Ex Parte No. MC-177, National Industrial Transportation League — Petition to Initiate Rulemaking On Negotiated Motor Common Carrier Rates*, 5 ICC 2d. 623 (1989) ..... 7

**STATUTORY PROVISIONS:**

49 U.S.C. § 10701 ..... 2, 3, 4, 7

49 U.S.C. § 10761 ..... 2, 7

No. 88-1958

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TRUSTEE FOR CARAVAN REFRIGERATED CARGO, INC.,

*Respondent.*

## PETITIONER'S REPLY BRIEF

### ARGUMENT

### I.

### ADDITIONAL CONFLICT BETWEEN CIRCUITS

The conflict between the Fifth Circuit opinion below and the law of other circuits has been heightened by issuance of the decision of the Eighth Circuit Court of Appeals in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, __ F.2d __ (8th Cir. 1989) (Slip opinion, July 17, 1989) The factual and legal issues faced by the shipper in *Maislin* are virtually identical to those encountered by Petitioner. In both cases, the shipper had negotiated with a motor common carrier for the application of particular rates. In both cases, the carrier billed and collected based on the negotiated rates but failed to file the rates with the ICC. In both cases, the

carrier's bankruptcy trustee or collection agent later brought an action to collect freight charges based on higher published rates which had remained in effect as a result of the carrier's failure to file the negotiated rates. In both cases, the carrier opposed referral to the ICC on the ground that the ICC lacked power to hold that the carrier's conduct could constitute an unreasonable practice contrary to 49 U.S.C. § 10701 so as to bar collection of the higher rates. The District Court in *Maislin*, however, rejected this position and referred the case to the ICC, which agreed with the shipper's unreasonable practice contention. The District Court then ordered the carrier's complaint dismissed based on the ICC's finding. *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 705 F. Supp. 1401 (W.D. Mo. 1988).

The Eighth Circuit opinion affirms the District Court both in its referral of unreasonableness issues to the ICC and in its application of ICC findings to bar the carrier's action for collection. The court held that "the reasonableness of [the carrier's] billing practices is a matter properly within the ICC's primary jurisdiction." *Id.* at __ (Slip opinion at 5). It also rejected the contention that the reasonableness requirements of 49 U.S.C. § 10701 must be ignored because of the rate filing requirements of 49 U.S.C. § 10761. *Id.* at __ (Slip opinion at 9). The court further determined that the exercise of powers described by the ICC in *Negotiated Rates* was justified by statute in light of regulatory changes following the Motor Carrier Act of 1980. *Id.* at __ (Slip opinion at 11-12). The Eighth Circuit opinion thus is in direct conflict with the Fifth Circuit opinion in the instant proceeding, within the meaning of Supreme Court Rule 17.1(a).

## II.

### REPLY TO BRIEF OF RESPONDENT

Respondent's brief echoes the Fifth Circuit opinion below in ignoring the statutory right of shippers under 49 U.S.C. § 10701 to seek relief before the Interstate Commerce Commission from unreasonable motor carrier practices. Despite decades of court and ICC precedent confirming the ICC's power to declare published rates or their application to be unreasonable, Respondent continues to maintain that the only principle to be considered by this Court is the requirement that carriers initially assess charges in accordance with their published tariffs. Respondent ignores the parallel principle that such tariffs may not be applied where found by the ICC to be unreasonable. *Louisville & N. R. R. Co.* v. *Maxwell*, 237 U.S. 94, 97 (1915); *Keogh* v. *Chicago & N.W. Ry. Co.*, 260 U.S. 156, 163 (1922). In effect, Respondent's brief asks this Court to simply read out of existence the requirement of 49 U.S.C. § 10701 that motor common carrier rates and practices must be reasonable. Nothing in Respondent's brief supports the decision of the Fifth Circuit to interfere with the exclusive jurisdiction of the ICC by barring Petitioner from obtaining an ICC ruling on its unreasonable practice defense.

Respondent's brief mentions the ICC's statutory reasonableness powers only twice. At page 16, Respondent asserts that "*no act or omission of the carrier* (even 'unreasonable practices') can estop [a carrier] from collecting its full tariff charges" (emphasis in original). None of the three cases cited in support of that proposition, however, makes any mention of the unreasonable practices defense placed in quotation marks by Respondent. These cases involved situations in which

the shippers chose simply to assert common law defenses in court. None of these cases involved a claim that the published rate sought to be collected was unreasonable or that assessment of the published rate would be an unreasonable practice, so as to require consideration of unreasonableness issues by the ICC.[1] Like the Eleventh Circuit, Petitioner believes that prior to the inception of the present controversy, no reported case *ever* had held that a shipper is required to pay a published rate in the face of an ICC finding that assessment of that rate would constitute an unreasonable practice under 49 U.S.C. § 10701. *Seaboard System R. R. v. United States*, 794 F.2d 635, 638 (11th Cir. 1986). All authority is to the contrary.

Respondent's other reference to the ICC's reasonableness powers is found in its characterization of 49 U.S.C. § 10701 as "nothing but a general statement of legislative purpose" (Respondent's brief, page 9). Such a characterization of a provision which has formed a cornerstone of transportation law since its original enactment in 1887 demonstrates either a serious propensity to misstate the law or a fundamental lack of understanding of the relevant statutes. The statutory requirement that motor carrier rates and practices *must* be reasonable bears no similarity to the statements of "general legislative purpose" referred to in the quotation on page 8 of Respondent's brief from this Court's opinion in *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 420 (1986). As the quotation itself indicates, the "general legislative purpose" referred to in *Square D* consisted of comments from the legislative history rather than statutory provisions. *Id.* at 419,

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[1] The Court of Appeals cases cited at page 10 of Respondent's brief similarly do not involve claims that the published rates sought to be collected were unreasonable or that collection of the published rates would constitute an unreasonable practice.

n. 25. This Court in *Square D* made three specific citations to the statutory power of the ICC to relieve shippers from unreasonableness of published rates or practices. *Id.* at 416, 418 n. 22, 416 n. 18. At no point did it refer to this power as a mere expression of general legislative purpose. Rather, the Court relied upon the existence of this power in the ICC to conclude that Congress did not intend to create remedies for parallel relief under the antitrust laws. *Id.* at 416, n. 18.

Respondent has totally misread the opinion of the D.C. Circuit in *Regular Common Carrier Conference, et al.* v. *United States*, 793 F.2d 376 (D.C. Cir. 1986), in citing that case for the proposition that a filed rate must be paid even in the face of an ICC finding of unreasonableness under 49 U.S.C. § 10701. The very language which Respondent quotes from that decision at page 13 of its brief negates such a contention. Judge (now Justice) Scalia noted in that opinion that one of the purposes served by statutory rate filing requirements was to allow the public "to enforce the requirement that rates be reasonable" [2] and "assert its right to challenge the lawfulness of existing or proposed rates". These are the very rights which Respondent mistakenly contends are barred by the filed rate doctrine. *Regular Common Carrier Conference* holds only that the ICC may not excuse common carriers from their statutory duty to file specific rates. It does not prohibit the ICC from using its reasonableness powers under 49 U.S.C. § 10701 to hold that such filed rates or their assessment would be unreasonable.

Respondent totally misconceives the primary and exclusive role which Congress and this Court have

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[2] Judge Scalia specifically cited 49 U.S.C. § 10701 following this reference to reasonableness. Respondent's brief omits this citation in its quotation from the Judge's opinion.

assigned to the ICC in determining rate reasonableness issues. ICC jurisdiction over the reasonableness of a rate or practice is exclusive. *United States* v. *Western Pacific Railroad*, 352 U.S. 59, 68 (1956)[3]; *Texas and P. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 448 (1907). As this Court has noted,

> Whenever a rate, rule or practice is attacked as unreasonable * * * there must be preliminary resort to the [ICC]. *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285 at 291 (1922).

The Fifth Circuit opinion ignores this settled rule of allocation of law-making power between courts and administrative agencies. *United States* v. *Western Pacific Railroad, supra*, 352 U.S. at 65. In effect, the implication in the Fifth Circuit's opinion that the carrier practices complained of could never be statutorily unreasonable usurps the statutory power of the ICC to make such a finding. The proper course would have been for the courts below to stay their proceedings pending referral of reasonableness issues to the ICC, subject to eventual court consideration under established standards of judicial review. *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, 360 U.S. 411, 421 (1959); *General American Tank Car Corp.* v. *Eldorado Terminal Co.*, 308 U.S. 422, 433 (1939); *Keller Industries, Inc.* v. *U.S.*, 449 F.2d 163, 174 at n. 31 (9th Cir. 1971).

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[3] Respondent's reading of *Western Pacific* as holding that referral to the ICC is required only where a shipper seeks interpretation of a technical tariff issue ignores the fact that the *Western Pacific* court specifically stated that all cases in which shippers challenge the reasonableness of rates are required to be referred to the ICC. *Id.* at 68. The technical issues criterion in *Western Pacific* referred to by Respondent applies only where a shipper seeks ICC assistance in the interpretation of a tariff as opposed to its reasonableness.

A complete exposition of the ICC's basis for exercising its statutory jurisdiction over motor common carrier unreasonable practices is contained in its reopened decision in *Ex Parte No. MC-177, National Industrial Transportation League — Petition to Initiate Rulemaking On Negotiated Motor Common Carrier Rates*, 5 ICC 2d. 623 (served June 29, 1989) (*"Negotiated Rates II"*). This decision supplements the ICC's earlier decision of the same name reported at 3 ICC 2d. 99 (1986). The supplemental decision outlines the ICC's reasons for concern with carrier practices of the type alleged by Petitioner. *Negotiated Rates II* at 5 ICC 2d. 631-634. The decision further emphasizes that rate filing requirements under 49 U.S.C. § 10761 remain in effect, but that assessment of such rates may be found to be an unreasonable practice under appropriate circumstances. *Id.* at 627, 631. Such an exercise of the ICC's powers is entirely in accord with 49 U.S.C. § 10701 and with the long line of precedents cited in the Petition for Certiorari.

## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

By: /s/ JOHN W. BRYANT
*Counsel of Record*

/s/ NEILL T. RIDDELL

EAMES, WILCOX, MASTEJ AND BRYANT
900 Guardian Building
Detroit, Michigan 48226
Telephone: (313) 963-3750

Dated:
July, 1989

*Counsel for Petitioner*

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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1988

SUPREME BEEF PROCESSORS, INC.,
*Petitioner,*
v.
ROBERT YAQUINTO, JR.,
TRUSTEE FOR CARAVAN REFRIGERATED CARGO, INC.,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF SHIPPERS NATIONAL FREIGHT CLAIMS COUNCIL, INC. IN SUPPORT OF PETITIONER

WILLIAM J. AUGELLO
*Counsel of Record*
AUGELLO, PEZOLD & HIRSCHMANN
120 Main Street
Huntington, NY 11743
(516) 427-0100
*Counsel for Amicus Curiae*

*Of Counsel:*
FRITZ R. KAHN
MARK J. ANDREWS
VERNER, LIIPFERT, BERNHARD,
MCPHERSON AND HAND, CHARTERED
Suite 700, The McPherson Building
901 15th Street, N.W.
Washington, D.C. 20005-2301
(202) 371-6000

June 30, 1989

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## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF SHIPPERS NATIONAL FREIGHT CLAIMS COUNCIL, INC. IN SUPPORT OF PETITIONER

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Movant, Shippers National Freight Claims Council, Inc. ("SNFCC"), pursuant to Rule 36.1 of the Rules of this Court, moves for leave to file the accompanying proposed brief *amicus curiae* in support of the position of the petitioner herein. As grounds for this motion, SNFCC states as follows:

1. Consent to file the brief *amicus curiae* has been requested of the Respondent by undersigned counsel but has been denied by it.

2. SNFCC is a voluntary, nonprofit organization, incorporated under the laws of the State of New York, with offices in Huntington, NY.

3. The membership of SNFCC is comprised of more than 750 companies which purchase freight transportation services from rail and motor carriers throughout this country, as well as Canada, and, hence, are concerned about freight charges and claims disputes.

4. SNFCC conducts seminars, publishes newsletters and reference books and otherwise endeavors to educate its members on the need for a sound transportation system and the means for effectively and fairly resolving freight charge and claims disputes.

5. Many, if not most, of the members of SNFCC within the last few years have been the subject of undercharge claims by the estates of defunct motor carriers, such as the Respondent in the instant proceeding. Thus, they have become the unwitting victims of the clash between the lower courts as to the obligation of freight shippers to pay the motor carriers' filed rates, notwithstanding that such rates, and the associated practices of the motor carriers (apparently including widespread misquotation of the filed rates), may have been unreasonable, in violation of 49 U.S.C. § 10701(a).

6. The members of SNFCC, moreover, have been buffeted by the ongoing disputes among the lower courts as to the jurisdiction of the Interstate Commerce Commission to determine the reasonableness issues, when asserted by shippers as defenses to motor carrier undercharge claims, and as to the deference that is due the agency's decisions.

7. These continuing controversies would be resolved by a grant of the Petition for a Writ of Certiorari in this, the first of the current spate of undercharge cases to have been decided by a United States Court of Appeals. A grant of the writ would serve to minimize the conflicts between the lower courts and, hence, to conserve judicial resources. It likewise would curb the inordinate expenditures of resources currently faced by SNFCC's members in defending themselves against the unwarranted motor carrier undercharge claims with which they are being inundated.

WHEREFORE, Movant, Shippers National Freight Claims Council, Inc., prays that it be permitted to file the accompanying brief *amicus curiae* in support of the Petition for a Writ of Certiorari.

Respectfully submitted,

WILLIAM J. AUGELLO
*Counsel of Record*
AUGELLO, PEZOLD & HIRSCHMANN
120 Main Street
Huntington, NY 11743
(516) 427-0100
*Counsel for Amicus Curiae*

*Of Counsel:*
FRITZ R. KAHN
MARK J. ANDREWS
VERNER, LIIPFERT, BERNHARD,
MCPHERSON AND HAND, CHARTERED
Suite 700, The McPherson Building
901 15th Street, N.W.
Washington, D.C. 20005-2301
(202) 371-6000

June 30, 1989

## QUESTION PRESENTED

Whether the filed rate doctrine, considered in light of the relaxed regulatory requirements mandated by the Motor Carrier Act of 1980, permits the Interstate Commerce Commission to exercise its exclusive jurisdiction to determine, under 49 U.S.C. §§ 10701(a) and 11705(b), the reasonableness of the rates and related practices of a motor common carrier which:

—has solicited freight business on the basis of reduced or discounted rates which it intentionally or negligently had not published in its tariffs as required by 49 U.S.C. § 10761;

—has enjoyed business from customers who reasonably relied on the reduced or discounted rates, did not know they were unpublished, and who timely paid the carrier's invoices based thereon; and

—later, after filing for bankruptcy or otherwise ceasing to operate, has caused its former customers to be sued for the difference between the reduced rates it unlawfully had failed to publish and the tariff rates duly filed with the ICC.

TABLE OF CONTENTS


| | Page |
|---|---|
| MOTION FOR LEAVE TO FILE | i |
| QUESTION PRESENTED | v |
| TABLE OF AUTHORITIES | ix |
| SUMMARY OF ARGUMENT | 2 |
| ARGUMENT | 2 |
| I. MOTOR CARRIER DEREGULATION HAS LED TO RATE REDUCTIONS, BANKRUPTCIES, AND AN ENORMOUS VOLUME OF UNDERCHARGE LITIGATION RAISING THE SAME ISSUES PRESENTED HERE | 2 |
| II. THE RATES SOUGHT TO BE COLLECTED, OR THE CLAIMANT MOTOR CARRIER'S ASSOCIATED PRACTICES, MAY HAVE BEEN DEMONSTRABLY UNREASONABLE | 4 |
| III. THE COURT BELOW, AS HAVE CERTAIN DISTRICT AND BANKRUPTCY COURTS, MISAPPREHENDED THE FILED RATE DOCTRINE | 6 |
| CONCLUSION | 12 |

APPENDICES

Appendix A—DIGEST of Unreasonable Carrier and Forwarder Practices Resulting from the Pro-Competitive Environment Created by The Motor Carrier Act of 1980

Appendix B—MOTOR CARRIERS Involved in Undercharge Actions Against Members of Shippers National Freight Claims Council, Inc.

TABLE OF CONTENTS—Continued

Appendix C—COURT DECISIONS Which Have Referred the Issue of Reasonableness of Carrier Rates and Practices to the ICC

Appendix D—COURT DECISIONS Denying Referral of Reasonableness Issues to the ICC

## TABLE OF AUTHORITIES

SUPREME COURT CASES: Page

*American Trucking Ass'ns v. Atchison, T. & S.F. Ry. Co.*, 387 U.S. 397 (1967) ..... 5
*Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370 (1932) ..... 8
*General Am. Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422 (1940) ..... 8
*Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962) ..... 8
*ICC v. Union Pac. R.R. Co.*, 222 U.S. 541 (1912) ..... 12
*Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922) ..... 7
*Louisville & N.R.R. Co. v. Maxwell*, 237 U.S. 94 (1915) ..... 7
*McLean Trucking Co. v. United States*, 321 U.S. 67 (1944) ..... 12
*Mississippi Valley Barge Line Co. v. United States*, 292 U.S. 282 (1934) ..... 12
*Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U.S. 184 (1913) ..... 8, 11
*Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986) ..... 8
*Texas & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) ..... 8
*T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959) ..... 11
*United States v. Pierce Auto Freight Lines*, 327 U.S. 515 (1946) ..... 11, 12
*United States v. Western Pac. R.R. Co.*, 352 U.S. 59 (1971) ..... 8

OTHER FEDERAL CASES:

*American Trucking Ass'ns, Inc. v. ICC*, 770 F.2d 535 (5th Cir. 1985) ..... 2
*Caravan Refrigerated Cargo, Inc. v. Yaquinto*, 864 F.2d 388 (5th Cir. 1989) ..... 3, 7, 9, 10, 11
*Feldspar Trucking Co. v. Greater Atl. Shippers Ass'n, Inc.*, 683 F. Supp. 1375 (N.D. Ga. 1987) ..... 6, 7

TABLE OF AUTHORITIES—Continued

Page

*Hanson v. Norfolk & W. Ry. Co.*, 689 F.2d 707 (7th Cir. 1982) ..... 10
*In re Taynton Freight Sys.*, 76 Bankr. 971 (Bankr. M.D. Pa. 1987) ..... 7
*INF, Ltd. v. Spectro Alloys Corp.*, 690 F. Supp. 808 (D. Minn. 1988) ..... 12
*Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 705 F. Supp. 1401 (W.D. Mo. 1988) ..... 12
*Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212 (8th Cir. 1970), *cert. denied*, 402 U.S. 999 (1971) ..... 8
*Motor Carrier Audit & Collection v. Portion Packing, Inc.*, 683 F. Supp. 202 (N.D. Ill. 1988) ..... 6
*National Motor Freight Traffic Ass'n v. United States*, 268 F. Supp. 90 (D.D.C. 1967), *aff'd mem.*, 393 U.S. 18 (1968) ..... 11
*Port Norris Exp. Co., Inc. v. ICC*, 757 F.2d 58 (3d Cir. 1985) ..... 2
*Seaboard Sys. R.R. Inc. v. United States*, 794 F.2d 635 (11th Cir. 1986) ..... 10
*United States v. United States Steel Corp.*, 645 F.2d 1282 (8th Cir. 1981) ..... 10
*United States v. Yellow Freight Sys., Inc.*, 762 F.2d 737 (9th Cir. 1985) ..... 10
*Western Transp. Co. v. Wilson & Co., Inc.*, 682 F.2d 1227 (7th Cir. 1982) ..... 10

INTERSTATE COMMERCE COMMISSION DECISIONS:

*Exemption of Motor Contract Carriers From Tariff Filing Requirement*, 133 M.C.C. 150 (1983); *aff'd, Central & S. Motor Freight Tariff Ass'n, Inc. v. United States*, 757 F.2d 301 (D.C. Cir. 1985) ..... 3
*Lawfulness of Volume Discount Rates by Motor Common Carrier of Property*, 365 I.C.C. 711 (1982) ..... 3

TABLE OF AUTHORITIES—Continued

Page

*National Indus. Transp. League—Petition to Inst. Rule on Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986) ..... 5

*Pricing Practices of Motor Common Carriers of Property Since the Motor Carrier Act of 1980*, Ex Parte Docket No. MC-166 (unreported), served September 13, 1983 ..... 3

*Rates For a Named Shipper or Receiver*, 367 I.C.C. 959 (1984) ..... 3

STATUTORY PROVISIONS AND OTHER AUTHORITIES:

Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980) (codified in scattered sections of 49 U.S.C. subtitle IV (1982) ..... 2

5 U.S.C. § 706 ..... 11

49 U.S.C. § 10701 ..... 9

49 U.S.C. § 10701(a) ..... 4, 5, 12

49 U.S.C. § 10761 ..... 4, 8

49 U.S.C. § 11705(b)(3) ..... 9, 12

49 U.S.C. § 11706 ..... 11

Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 253, 89th Cong., 1st Sess., April 22, 1965 ..... 11

*101st Annual Report of the Interstate Commerce Commission*, 55 (1987) ..... 2

Glaskowsky, *Effects of Deregulation on Motor Carriers, Eno Foundation for Transp., Inc.* 8 (1986) ..... 3

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## BRIEF *AMICUS CURIAE* OF SHIPPERS NATIONAL FREIGHT CLAIMS COUNCIL, INC. IN SUPPORT OF PETITIONER

---

Shippers National Freight Claims Council, Inc. ("SNFCC")[1], pursuant to Rule 36.1 of the Rules of this Court, as its proposed brief *amicus curiae*, states, as follows:

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[1] The organization and its interests in this proceeding are identified in the accompanying Motion for Leave to File.

## SUMMARY OF ARGUMENT

The filed rate doctrine, as enunciated by this Court in the *Maxwell* and *Keogh* cases, permits the assertion of the unreasonableness of the carrier's rates or practices as a defense to an undercharge claim. When this defense is raised, the court proceedings must be stayed and the reasonableness issue referred to the Interstate Commerce Commission ("ICC"), as this Court held in the *General American* and *Western Pacific* cases. In failing to follow these fundamentals, the court below, not only misapprehended the teachings of this Court's decisions, but placed itself at odds with every other Court of Appeals that has considered the matter.

## ARGUMENT

### I. MOTOR CARRIER DEREGULATION HAS LED TO RATE REDUCTIONS, BANKRUPTCIES, AND AN ENORMOUS VOLUME OF UNDERCHARGE LITIGATION RAISING THE SAME ISSUES PRESENTED HERE.

The Nation's motor carrier industry has been deregulated substantially, both by the enactment of the Motor Carrier Act of 1980 (hereafter cited as "1980 Act")[2] and by the decisions of the ICC since then.[3] The great number of new entrants into the trucking business, coupled with the vast expansions of those already in it,[4] has resulted in fierce competition between the motor car-

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[2] Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980) (codified in scattered sections of 49 U.S.C., subtitle IV (1982)).

[3] *See, e.g., American Trucking Ass'ns, Inc. v. ICC*, 770 F.2d 535 (5th Cir. 1985); *Port Norris Exp. Co., Inc. v. ICC*, 757 F.2d 58 (3d Cir. 1985).

[4] *See, e.g., 101st Annual Report of the Interstate Commerce Commission* 55 (1987).

riers and in dramatic rate reductions and discounts from charges that otherwise would apply.[5]

Many motor carriers, in order to preserve market shares, have cut their rates and charges below compensatory levels and ultimately have been driven to bankruptcy.[6] Subsequently, numerous freight rate audit bureaus have secured retainers from debtor carriers or their trustees for the sole purpose of conducting post-audits of the carriers' paid freight bills. These audits often have confirmed what the audit bureaus well knew when securing their retainers, namely, that the debtor carriers' sales representatives, intentionally or unwittingly,[7] had been soliciting shippers' freight business on

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[5] *See, e.g., Rates for a Named Shipper or Receiver*, 367 I.C.C. 959 (1984); *Lawfulness of Volume Discount Rates by Motor Common Carrier of Property*, 365 I.C.C. 711 (1982); Ex Parte Docket No. MC-166, *Pricing Practices of Motor Common Carriers of Property Since the Motor Carrier Act of 1980* (unreported), served September 13, 1983. *See also, Exemption of Motor Contract Carriers From Tariff Filing Requirement*, 133 M.C.C. 150 (1983), *aff'd, Central & S. Motor Freight Tariff Ass'n, Inc. v. United States*, 757 F.2d 301 (D.C. Cir. 1985), in which the ICC exempted contract carriers from the tariff filing requirement, an action erroneously ascribed by the court below to the Congress. 864 F.2d at 390, 391; Appendix B to Petition for a Writ of Certiorari ("Cert. Pet. App. B") at 6-7.

[6] "Among the largest 100 carriers, during [the years 1978 through 1985] approximately 20 percent failed, including McLean Trucking and Spector-Red Ball, then ranked fifth and sixth, respectively. Most recently, Hall's Motor Transit (No. 17), filed for bankruptcy under Chapter 11. Other major failures in the top 100 included Interstate Motor Express, Gordon's Transport, IML Freight, Commercial Lovelace, Cooper-Jarrett, and others." Glaskowsky, *Effects of Deregulation on Motor Carriers*, Eno Foundation for Transportation, Inc., Washington, D.C., 8 (1986).

[7] Anecdotal examples of misleading solicitations and other practices, which have come to SNFCC's attention through its work with shipper defense groups in cases similar to this one (*see infra*, Part II), are offered in Appendix A to this brief.

the basis of rate reductions or discounts which the carriers had not published in their tariffs on file with the ICC. The audit bureaus, relying on the continuing requirement of 49 U.S.C. § 10761 for publication of motor common carrier rates in tariffs and ostensibly seeking to maximize the estates of the bankrupt carriers, have lodged undercharge claims in the name of the debtors or their trustees against the carriers' former customers.[8] These claims have been based on the differences between the charges actually paid by the shippers in reliance on the quoted rates, on the one hand, and, on the other hand, the charges that assertedly should have been paid in accordance with the published and filed tariffs.

When shippers have declined to pay such claims, lawsuits for the asserted undercharges have followed, either as adversary cases within a bankruptcy proceeding or as separate actions in Federal or state courts. Such actions literally have numbered in the hundreds within the last several years, as attested by the partial listing of cases in the Petition for a Writ of Certiorari (Cert. Pet. Apps. G, H). The total amounts at issue are estimated by SNFCC to be in the range of $30 to $50 million.

## II. THE RATES SOUGHT TO BE COLLECTED, OR THE CLAIMANT MOTOR CARRIER'S ASSOCIATED PRACTICES, MAY HAVE BEEN DEMONSTRABLY UNREASONABLE.

In most of the undercharge proceedings, the defendant shippers have defended on the grounds, among others, that the rates sought to be collected or the motor carriers' associated practices were unreasonable, in violation of 49 U.S.C. § 10701(a). A threshold controversy in almost all such actions has been whether the proceedings should be stayed, pending referral of the reasonableness issues to the ICC. The defendant shippers properly and under-

[8] A partial listing of the motor carriers involved in undercharge actions against SNFCC members appears in Appendix B to this brief.

standably have urged referral, on the basis of the seminal decision of the ICC in *National Indus. Transp. League—Petition to Institute Rule on Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986).

In the cited proceeding, hereafter referred to as *Negotiated Rates*, the ICC correctly held that the filed rate doctrine, *infra* Part III, did not bar a shipper from asserting an unreasonableness defense to an undercharge claim brought on behalf of a motor carrier.[9] The ICC further held in *Negotiated Rates* that, if the facts established (1) quotation of a rate other than the tariff rate by a carrier representative with apparent authority upon which the shipper legitimately could rely, (2) an understanding between them that the shipment could be made upon that rate and (3) reasonable reliance by the shipper upon the rate quotation in tendering the freight to the motor carrier, then the misrepresentation that the quotation reflected the published and filed rate, subsequently the source of the undercharge claim, constituted an unreasonable practice in violation of 49 U.S.C. § 10701(a).

The plaintiff audit bureaus and motor carrier estates, on the other hand, have resisted referral to the ICC. They mistakenly have argued that the filed rate doctrine does not permit the assertion of rate or practice unreasonableness as a defense and that, accordingly, such referral is unnecessary, for the rate as published and filed by the motor carrier inevitably must be paid.

The clash of these viewpoints in the federal district courts, the bankruptcy courts and various state courts has produced a serious split of authority, although the majority view supports referral to the ICC. SNFCC has monitored the development of this split of authority as part of an ongoing program to assist its shipper mem-

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[9] The ICC construed the filed rate doctrine in the light of contemporary conditions in the motor carrier industry, as it patently was permitted to do. *American Trucking Ass'ns v. Atchison, T. & S.F. Ry. Co.*, 387 U.S. 397, 416 (1967).

bers in the formation of joint defense groups to resist undercharge claims. At this writing, SNFCC is aware of over 100 court decisions granting motions for referral of reasonableness issues to the ICC in motor carrier undercharge cases (*see* Cert. Pet. App. G), and approximately 50 court decisions denying such referral. In many instances, courts within a single state, or even the district court and the bankruptcy court within a single federal judicial district, have reached diametrically opposite conclusions on this issue. Although most decisions on each side of the issue are unreported memorandum opinions or *per curiam* orders, they are listed in appendices to this brief for the limited purpose of illustrating the magnitude of the problem these cases present to shippers, carriers and the judicial system alike.[10]

## III. THE COURT BELOW, AS HAVE CERTAIN DISTRICT AND BANKRUPTCY COURTS, MISAPPREHENDED THE FILED RATE DOCTRINE.

The court below foreclosed the defendant shipper from asserting the unreasonableness of the motor carrier's rates or practices as a defense to the undercharge claims brought against it. In so doing, the court below, as have certain district and bankruptcy courts,[11] grievously mis-

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[10] Appendix C provides a geographically organized listing of known decisions granting referral, while Appendix D provides similar information on known decisions denying referral. Official reporter citations (or, as a second choice, paragraph citations to *Federal Carrier Cases*) are provided wherever available. In other instances, unreported court decisions granting referral can be further identified by reference to the ICC docket number of the proceeding in which the agency addresses the referred issues, and SNFCC is providing this information wherever possible. SNFCC, however, does not seek herein to rely on any of the decisions listed for the Court's convenience in Appendices C and D, except to the extent that such decisions may be included (with appropriate citations) in the Table of Authorities accompanying this brief.

[11] *See, e.g., Motor Carrier Audit & Collection v. Portion Packing, Inc.*, 683 F. Supp. 202 (N.D. Ill. 1988); *Feldspar Trucking Co. v.*

apprehended the filed rate doctrine upon which it sought to rely. The filed rate doctrine had its genesis in *Louisville & N.R.R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915), wherein this Court declared:

> Under the interstate commerce act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, *unless it is found by the Commission to be unreasonable* [emphasis added].

It is the italicized clause that preserves to the defendant shippers the right to assert the unreasonableness defense. Significantly, the court below, as have certain others, omitted the underscored clause in quoting the excerpt from this Court's *Maxwell* decision. 864 F.2d at 390; Cert. Pet. App. B at 5.[12]

That the filed rate doctrine comprehends the assertion of a reasonableness defense before the ICC was underscored, again, by this Court's decision in *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922), again cited by the court below, as by many others, but only partially. In the *Keogh* case, 260 U.S. at 163, this Court said:

> The legal rights of shipper against carrier in respect to a rate are measured by the published tariff. *Unless and until suspended or set aside* [*by the ICC*], this rate is made, for all purposes, the legal rate, as between carrier and shipper [emphasis added].

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*Greater Atl. Shippers Ass'n, Inc.*, 683 F. Supp. 1375 (N.D. Ga. 1987); *In re Taynton Freight Sys.*, 76 Bankr. 971 (Bankr. M.D. Pa. 1987).

[12] Whether the omission was inadvertent or deliberate we do not know. We do suggest, however, that, if the excised version of the relevant portion of this Court's *Maxwell* decision reflects the lower court's understanding of the filed rate doctrine, the lower court is in error, and its decision requires *per curiam* reversal on this ground alone.

Nothing in this Court's affirmation of *Keogh* in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), alters the holding just quoted.

The reason for the rule is obvious. As this Court noted in *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370, 384 (1932):

> [T]he legal rate was not made by the statute a lawful rate—it was lawful only if it was reasonable. Under section 6 [49 U.S.C. § 10761], the shipper was bound to pay the legal rate; but, if he could show that it was unreasonable, he might recover reparations.

*Accord Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 238 (8th Cir. 1970), *cert. denied*, 402 U.S. 999 (1971) (stating that "[M]erely because the carrier is bound to charge the filed rate, it does not follow that he is entitled to keep it"). Moreover, if a reasonableness issue requires referral to the ICC when raised in a shipper's action for reparations from a carrier, the primary jurisdiction of the ICC applies in equal measure when a shipper raises the same issue by way of defense to a carrier's undercharge action. *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 71 (1956). Of even greater significance here, the agency's primary jurisdiction over reasonableness issues extends to a motor carrier's rate-related practices as well as to the rates themselves. *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 87-88 (1962).

The exclusive jurisdiction of the ICC over rate and practice reasonableness issues has been recognized for generations. *Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U.S. 184, 196 (1913); *Texas & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 448 (1907). This Court definitively restated the principle in *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940), as follows:

> When it appeared in the course of the litigation that an administrative problem committed to the Commission was involved, the court should have stayed its hand pending the Commission's determination of the *lawfulness and reasonableness of the practice* under the terms of the Act. . . . [The] cause should be held pending the conclusion of an approfenses the petitioner may have will be saved to it [emphasis added].

It necessarily follows from these premises that, if the unreasonableness of the motor carrier's rates or practices is asserted as a defense in an action for undercharges (as it was here by Petitioner), then the court case must be stayed, pending referral of the reasonableness issues to the ICC. Indeed, the determination of the reasonableness of a motor carrier's rates or practices is committed to the exclusive jurisdiction of the ICC; the issue is lodged with the agency by statute, not just by judicial precedent relating to primary jurisdiction. Thus, an essential statutory element of a motor carrier's liability to shippers for "imposition of rates for transportation or service" which violate the ICC's governing statute, including the reasonableness standard of 49 U.S.C. § 10701, is that the violation be one which "the Commission finds." 49 U.S.C. § 11705(b)(3). If a court prohibits a shipper from timely requesting such a finding by the ICC, the only body empowered to make it, the result is no less than a deprivation of the shipper's due process of law.

Despite the foregoing, the court below asserts that it needs no ICC assistance to resolve what it characterizes as simple tariff-construction issues. 864 F.2d at 390, Cert. Pet. App. B at 4. In taking such a crimped view of the time-honored primary jurisdiction doctrine, the court below has fallen seriously out of step with the other Courts of Appeals that have addressed ICC referral issues subsequent to the regulatory reforms enacted in 1980. Even though an issue referred to the ICC might

involve tariff construction issues on its face, referral nonetheless is proper if the issue also implicates questions of "transportation policy" on which "uniform and expert" ICC guidance is necessary, *United States v. Yellow Freight Sys., Inc.*, 762 F.2d 737, 739 (9th Cir. 1985), or if a statutory referral obligation exists, as demonstrated *supra*.

Other post-1980 cases taking a broad view of the types of issues committed to the primary jurisdiction of the ICC have included *Hanson v. Norfolk & W. Ry. Co.*, 689 F.2d 707 (7th Cir. 1982) (allegation that trailer-on-flatcar service, long an object of ICC policy concerns, was being provided without proper tariff authority); *Western Transport Co. v. Wilson & Co., Inc.*, 682 F.2d 1227 (7th Cir. 1982) (undercharge defendant's allegation that tariff requirement for certain notations on bills of lading was unreasonable prerequisite for applicability of motor carrier discount rates); and *United States v. United States Steel Corp.*, 645 F.2d 1285 (8th Cir. 1981) (assertions by shipper defendant under Hepburn Act, now codified at 49 U.S.C. § 11902, that tariff prohibiting alleged rebates was discriminatory, that industry usage affected proper tariff construction, and that shipper honestly and reasonably believed the tariff allowed rebates). *See also*, *Seaboard Sys. R.R. Inc. v. United States*, 794 F.2d 635 (11th Cir. 1986).[13] Surely the primary jurisdiction doctrine applies as well here, given the transportation policy issues raised under the 1980 Act when bankrupt motor carriers systematically invoke the filed rate doctrine against a multitude of former customers to whom the

[13] The lower court sought to distinguish the *Seaboard* case on the ground that the tariff was, in its words, "unclear or ambiguous to the ordinary user." 864 F.2d at 392; Cert. Pet. App. B at 10. A fair reading of the decision, however, shows that the court affirmed the ICC's decision because the agency reasonably could hold, notwithstanding the same filed rate doctrine relied upon by respondents here, that it would not countenance the carrier's misquotation or misrepresentation of its rates.

carriers themselves misquoted rates, and given the need for "uniform and expert" ICC guidance to a judicial system seriously split over these issues.

Although there formerly was uncertainty whether the ICC could entertain trial court referrals of the unreasonableness of motor carrier rates or practices pertaining to past shipments, *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959), any doubt that it can do so was removed by the 1965 revision of what is now 49 U.S.C. §11706. In speaking of the pertinent section of the bill, H.R. 5401, 89th Cong., 1st Sess., the Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 253, dated April 22, 1965, said:

> [It] would permit a court of competent jurisdiction to award reparations to persons injured through violations of the Interstate Commerce Act by motor carriers and freight forwarders subject thereto. This would be accomplished in accordance with established judicial reference procedures under which the Commission would be called upon to aid the court by making necessary administrative determinations relating to the amount of reparations. This would restore a procedure formerly available to shippers which was set aside by the Supreme Court in 1959 by its decision in the *T.I.M.E.* case. 359 U.S. at 464 . . . .

*See National Motor Freight Traffic Ass'n v. United States*, 268 F. Supp. 90 (D.D.C. 1967), *aff'd mem.*, 393 U.S. 18 (1968).

The ICC's finding of unreasonableness, of course, would be binding upon the referring court, absent abuse of discretion or want of substantial evidence. 5 U.S.C. § 706; *Pennsylvania R.R. Co. v. United States*, 363 U.S. 202, 205 (1960).[14] *Accord United States v. Pierce Auto*

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[14] The court below erroneously refers to the Commission's decision in Ex Parte Docket No. MC-177 as being advisory only, 864 F.2d at 390; Cert. Pet. App. B at 5, when in fact it represents

*Freight Lines*, 327 U.S. 515, 536 (1946); *McLean Trucking Co. v. United States*, 321 U.S. 67, 87 (1944); *Mississippi Valley Barge Line Co. v. United States*, 292 U.S. 282, 286 (1934); *ICC v. Union Pac. R.R. Co.*, 222 U.S. 541, 547 (1912).[15]

## CONCLUSION

The court below misapprehends the filed rate doctrine. Its decision ignores the teachings of this Court's earlier decisions, most notably in the *Maxwell* and *Keogh* cases, and is at odds with the decisions of all other United States Courts of Appeals that have considered the propriety of allowing unreasonableness of rates or practices to be asserted as defenses to undercharge claims.

To permit collection agencies and freight bill auditors to profit from carriers' past unlawful failure to publish their discount rates would undercut Congressional intent to make the trucking industry more competitive and, thus, to reduce the cost of motor carrier transportation for the Nation's shippers. The 1980 Act succeeded in creating intensified price competition through reduction of regulatory barriers, but neither Congress nor the ICC anticipated the unlawful manner by which many carriers implemented their price cuts. In view of the changes in national transportation policy mandated by Congress in 1980, the ICC's remedial actions in response to these unlawful acts were proper and must be upheld by reversing the Fifth Circuit's decision.

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a well-formulated exercise of the agency's statutory powers under 49 U.S.C. §§ 10701(a) and 11705(b) (8), in addition to its exclusive jurisdiction over reasonableness issues as recognized in the decisions of this Court.

[15] Compounding the need for definitive guidance from this Court is the developing split of authority on whether or not to sustain ICC determinations that motor carriers' rate-related practices in undercharge situations are unreasonable. *Compare INF, Ltd. v. Spectro Alloys Corp.*, 690 F. Supp. 808 (D. Minn. 1988) *with Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 705 F. Supp. 1401 (W.D. Mo. 1988).

The Petition for a Writ of Certiorari, accordingly, should be granted.

Respectfully submitted,

WILLIAM J. AUGELLO
*Counsel of Record*
AUGELLO, PEZOLD & HIRSCHMANN
120 Main Street
Huntington, NY 11743
(516) 427-0100
*Counsel for Amicus Curiae*

*Of Counsel:*
FRITZ R. KAHN
MARK J. ANDREWS
VERNER, LIIPFERT, BERNHARD,
MCPHERSON AND HAND, CHARTERED
Suite 700, The McPherson Building
901 15th Street, N.W.
Washington, D.C. 20005-2301
(202) 371-6000

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# APPENDICES

## APPENDIX A

## DIGEST OF UNREASONABLE CARRIER AND FORWARDER PRACTICES RESULTING FROM THE PRO-COMPETITIVE ENVIRONMENT CREATED BY THE MOTOR CARRIER ACT OF 1980

1. A motor carrier's President negotiated rates with a major dress manufacturer, using a schedule of rates purported to be the filed tariff rates. After years of doing business at these rates, the parties experienced a conflict, and the shipper decided to discontinue doing business with this carrier. The carrier's president then threatened to institute a suit against the shipper for the difference between the billed rates and the actual tariff rates which were on file with the Commission without the shipper's knowledge, a sum which exceeded $1 million. (*Lady Carol Dresses v. The International Distribution Centers, Inc.*, MC-C-10867 (ICC)).

2. The carrier's Vice-President of Pricing established rate and discount policies for its salesmen but then published numerous restrictions and limitations in its tariff without the knowledge or consent of the salesmen or the shipper/customer. One such restriction limited the discount to points served *directly* by the carrier. Although the carrier held operating authority from the ICC to serve all points in the United States and advertised "Direct Single Carrier Service, Nationwide," the carrier then unilaterally routed portions of shippers' traffic via connecting carriers for its own operating convenience, thus voiding the discounts under a strict application of the tariff.

Before the carrier filed for bankruptcy, the Vice-President of Pricing and Assistant Controller left the carrier's employ and formed an auditing firm which obtained a contract from the Trustee to audit the bankrupt carrier's freight bills. This auditing firm has admitted collecting $8.5 million thus far in undercharges

which the Vice-President of Pricing helped to create during the course of his employment by the carrier. (*McLean Trucking Company and Pacesetter/Coliseum Cartage Company, Inc.*, Bankr. W.D.N.C.)

3. A carrier's President was asked why the negotiated rate was not being filed in the carrier's tariff to which he responded, "I don't know." The President then failed to bring the carrier's rate practices into compliance with the law, thus indicating management's consent to, and approval of this practice. (*Oneida Motor Freight v. Appco*, E.D.N.Y.)

4. A forwarder's President issued instructions to its sales force and tariff department to negotiate rates but not publish them unless a shipper insisted upon receiving a published tariff before tendering traffic, thus preventing its competitors from meeting their discounts. (*Wescar Freight Systems*, California and Oregon Federal and State Courts).

5. A carrier agreed to publish a negotiated rate in terms of dollars per truck load. However, when published and filed with the ICC, the carrier unilaterally added a 46,000 pound maximum in the tariff without informing the shipper. After a long period of billing at this rate, the carrier voluntarily discontinued business and began to issue undercharge claims for the excess weight shipped and accepted by the carrier without complaint. (*Rebel v. Muehlenstein*, W.D. Tenn.)

6. A forwarder agreed to publish a rate to Kings Mountain, N.C. and the shipper tendered traffic and paid the agreed rate to this point over a long period of time. After the carrier discontinued its business, it sold its freight bills to a collection agency which discovered that the forwarder erroneously published the rate to "Kings Mountain, TN," a *non-existent* point. The auditor filed undercharge claims totalling $128,763 based on the for-

warder's class rates. (*Wescar Freight Systems v. Freightliner*, D.C. Or.)

7. A forwarder's salesman was furnished a counterfeit copy of a tariff page alleging that it represented the rates filed on a specific date for the shipper. Traffic was tendered to the forwarder in reliance upon that representation, but the forwarder later sued for a higher rate when its collection agency discovered that the tariff page shown to the shipper was not filed until months later and in a different print. (*Wescar Freight Systems, Inc.*)

8. A motor carrier quoted flat rates over the telephone in order to obtain revenue to cover operating expenses for the back haul of its equipment to its home base. The rate quotation was verified by typing on the freight bill the name of the company official authorizing the rate. However, the rate quotation was never published in the carrier's tariff or filed with the ICC. (*Maislin*, E.D. Mich.).

9. A frieght salesman solicited a shipper's traffic, contending that the company holds contract carrier authority and a broker's license from the ICC. The parties agreed to a rate which the shipper believed was quoted by the salesman in his capacity as a broker possessing a contract with its contract carrier affiliate, thus avoiding the necessity for filing the rate. After bankruptcy, the collection agency billed the shipper for that company's *common* carrier tariff rates. (*Sharm Express, Inc.*, Bankr. Ct. Minn.).

10. A carrier indicated in its tariff that it participated in the National Motor Freight Classification, which is an essential tariff establishing a classification rating for each commodity shipped. However, the carrier failed to become a party to the classification thus rendering all of its class rates defective. The auditors ignored this defect and sued the carrier's former customers for the full class rates, contending that participation in the classifi-

cation is not necessary. (*Transportation Systems International, Inc.*, Bankr. Ct., Minn.)

11. A carrier required designated officers to approve all discount agreements, informing its salesmen that the rates were lawfully filed when the "Discount Request Form" was initialled by designated officers. The salesmen was not informed that the customer must request the discount in writing or that the discounts were conditioned on the volume of traffic tendered to the carrier each month.

After bankruptcy, one of the officials whose signature was required to approve discounts became an owner of the collection agency seeking the recovery of additional freight charges from the shippers for whom he approved the discounts on the grounds that no letter of participation was on file for those shippers, and/or that volume minimums were not met. The attorney representing the collection agency was the son of the former owner of the carrier and brother of one of its managing officers who was authorized to approve discounts. (*Transportation Systems International, Inc.*, Bankr. Ct. Minn.)

12. A carrier negotiated discounts with its shippers, but when published, its tariffs incorporated by reference a rule which conditions the discount upon the payment of freight charges within the carrier's credit rules. The latter rules were not brought to the shippers' or carrier salesmen's attention until after the carrier files for bankruptcy, at which time undercharge claims for the full amount of the discount were filed. (*Campbell 66*, D.N.J.)

13. Atrustee sold a bankrupt carrier's freight bills to a collection agency for auditing and filing undercharge claims. The collection agency then sued shippers in the Bankruptcy Court to gain an additional two years within which to recover claims, as provided by the Bankruptcy Act. When the Bankruptcy Judge dismissed these suits for lack of jurisdiction, the collection agency then attempted to regain the jurisdiction of the Bankruptcy

Court by agreeing to return 5 percent of the amounts collected to the Trustee, a scheme which the Bankruptcy Court later rejected. (*Coliseum Cartage Company, Inc.*, D.N.C.)

14. A carrier quoted rates to a broker by telephone, but never furnished a copy of its filed tariff although requested to do so by the broker. After bankruptcy, the collection agency billed the broker for late payment of freight charges published in the carrier's tariff which were never disclosed to the broker, consisting of 1.25 percent per month and attorney fees of 33 percent of the transportation and late payment charges. (*Coliseum Cartage*, D.N.C.)

## APPENDIX B

### MOTOR CARRIERS INVOLVED IN UNDERCHARGE ACTIONS AGAINST MEMBERS OF SHIPPERS NATIONAL FREIGHT CLAIMS COUNCIL, INC.

ADVANCE UNITED EXPRESSWAYS, INC.
ALLSTATE
AMERICAN FREIGHT SYSTEM, INC.
BRINKE TRANSPORTATION CORP.
CAMPBELL SIXTY SIX EXPRESS, INC.
COLISEUM CARTAGE COMPANY, INC.
DUDLEY TRUCKING
DUNKLEY TRANSPORTATION
EAGLE/FB
EAZOR TRUCKING
EXPRESS TRANSPORTATION COMPANY
FREIGHTCOR SERVICES, INC.
HALLS MOTOR TRANSIT COMPANY
R. L. HARRISON TRUCK COMPANY
INDIANHEAD TRUCK LINE
LEE WAY MOTOR FREIGHT, INC.
MAISLIN INDUSTRIES, U.S. INC.
MANLEY TRUCK LINE, INC.
MCLEAN TRUCKING COMPANY
MILNE TRUCK LINES, INC.
MISLETOE EXPRESS SERVICES
MURPHY MOTOR FREIGHT LINES, INC.
NOERR MOTOR FREIGHT, INC.
ONEIDA MOTOR FREIGHT, INC.
OVERLAND EXPRESS, INC.
REBEL MOTOR FREIGHT
RITTER TRANSPORTATION, INC.
RFI TRANSPORT, INC.
RTC
SANTA FE TRAIL
SHARM EXPRESS, INC.

SOUTHWESTERN MOTOR FREIGHT
SQUAW TRANSIT COMPANY
SUBURBAN MOTOR FREIGHT
S & W FREIGHT
SUTCO TRANSPORTATION
SYSTEM 99
TOBLER TRANSFER
TRANSPORTATION SYSTEM
INTERNATIONAL INC.
TOTAL TRANSPORTATION
TWIN CITY FREIGHT, INC.
UNITED SHIPPING COMPANY
WESCAR FREIGHT SYSTEM
L. C. WORLEY TRANSFER, INC.

## APPENDIX C

## COURT DECISIONS WHICH HAVE REFERRED THE ISSUE OF REASONABLENESS OF CARRIER RATES AND PRACTICES TO THE ICC

ARKANSAS

*Prof. Trucking Auditing, Inc., v. Royal Oak Enters., Inc.*, No. LR-C-87-422 (E.D. Ark. Oct. 9, 1987), MC-C-30088 (Aug. 24, 1988).

*Rebel Motor Freight v. Specialty Oil Co.*, LR-C-87 (E.D. Ark. Oct. 14, 1988) (¶ 83,316).

CALIFORNIA

*Southwest Freight Lines v. Continental Holding*, No. 48986 (Mun. Ct. Cal. Apr. 2, 1987), MC-C-30051 (Apr. 22, 1988).

*RTC Transp. v. Country Pride Foods*, No. S-86-1509 (E.D. Cal. July 9, 1987).

*RTC & Transp. Int'l v. Alex Foods*, No. 86-5628 DT (C.D. Cal.), MC-C-30085 (¶ 37,572).

*Motor Carrier Audit and Collection Co. v. Conagra Poultry Co.*, No. S-87-0842-MLS (E.D. Cal.), MC-C-30064 (¶ 37,524).

*Southwest Freight Lines v. Kaiser Aluminum, Inc.*, No. C-86-0275 (July 18, 1986), MC-C-30010.

*West Coast Truck Line v. American Steel Inc.*, No. 5-87-104 (E.D. Cal. July 17, 1987), MC-C-30062 (Apr. 25, 1988).

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NOTE: ICC Docket Numbers are designated "MC-C-30000," etc. The "¶ 37,000" series references are to Commerce Clearing House's Federal Carrier Cases reports for ICC decisions. The "¶ 80,000" series references are to CCH's court decisions in the same reports.

*West Coast Truck Line v. Lily Tulip*, No. CV-87-0929 (E.D. Cal. Oct. 29, 1987).

*Wescar Freight Sys., Inc. v. Milwaukee Elec. Tool Corp.*, No. 89-6464 (Super. Ct. Apr. 4, 1989).

COLORADO

*Delta Traffic Serv. v. Marine Lumber Co.*, 483 F. Supp. 734 (D. Colo. 1987).

DELAWARE

*Delta Traffic Serv. & Campbell 66 Express Inc. v. ICI Americas, Inc.*, No. CA-88-196-CMW (D. Del. Mar. 23, 1989).

GEORGIA

*Delta Traffic Serv. v. Commercial Cold Storage, Inc.*, No. C86-2132A (Mar. 23, 1987), MC-C-30005.

*Delta Traffic Servs. Assignee of RTC Transp., Inc. v. George A. Hormel & Co.*, No. CA-87-27A (May 19, 1987).

*Delta (Oneida & Claxton Transp.) v. Fort Howard Cup*, (N.D. Ga.), MC-C-30108.

*Delta Traffic Servs. (Oneida and Claxton Transport) v. K.R. Newsprint, Virginia Paper Mfg., CEI Newsprint*, (N.D. Ga. Jan. 19, 1989), MC-C-30108.

*Delta Traffic Servs. (Oneida) v. Knight-Ridder Newspaper Sales, Inc.*, 691 F. Supp. 339 (N.D. Ga. 1988).

ILLINOIS

*Inman Freight Systs., Inc. v. Boise Cascade*, No. 83-C-8968 (N.D. Ill. Aug. 2, 1988), MC-C-10928 (¶ 83,406).

*Motor Carrier Audit & Collection (RTC) v. Orval Kent Food Co.*, No. 87-C-5860 (N.D. Ill. Oct. 2, 1987), MC-C-30081 (Nov. 22, 1988) (¶ 37,584).

*Dependable Cartage & Transp. Co. v. Sovereign Oil Co.*, No. 84-C-4949 (N.D. Ill. Oct. 2, 1987), MC-C-30081 (Nov. 22, 1988) (¶ 37,584).

*Tobler Transfer Bankr. Christison, Trustee v. Caterpiller*, No. 85-00596, 74 Bankr. 373 (Bankr. Ct. C.D. Ill. May 29, 1987).

*Tobler Transfer v. General Mills*, Nos. 185-00596, 87-8050B (Bankr. Ct. C.D. Ill. Nov. 17, 1987), MC-C-30095 (Mar. 9, 1989).

*Tobler Transfer v. Ottowa Strong and Strong Caterpillar, Inc.*, Nos. 185-00596, 86-8135, 8184 & 8215 (May 2, 1987), MC-C-30095 (Mar. 7, 1989).

*Tobler Transfer v. Fleming Potter Co.*, Nos. 85-00596, 8050A (Bankr. Ct. C.D. Ill. Nov. 17, 1987).

*Tobler Transfer v. Hiram Walker*, 74 Bankr. 373 (Bankr. Ct. C.D. Ill. May 29, 1987), MC-C-30061 (Jan. 12, 1989).

*Tobler Transfer v. Navistar Int'l Transp.*, MC-C-30116, Mar. 1989.

*Orscheln Bros. Truck Lines v. Toastmaster*, No. 84-C-7338 (N.D. Ill. Nov. 8, 1985), MC-C-10988 (Mar. 14, 1988 (decision of Sept. 28, 1988) (1988 Fed. Car. Cas. ¶ 83,410 (affirming ICC's decision in MC-C-10989).

*Orscheln Bros. Truck Lines v. ooper Indus.*, No. 85-C-8398 (N.D. Ill. 1986) (decision of Sept. 28, 1988) (1988 Fed. Car. Cas. ¶ 83,410) (affirming ICC's decision in MC-C-10989).

*Orscheln Bros., v. Anderson Clayton Co.*, No. 85-C-8639 (N.D. Ill. Nov. 24, 1987), MC-C-10955.

*Orscheln Bros. Truck Line v. Zenith Elec. Corp.*, No. 85-C-8638 (E.D. Ill. Mar. 3, 1986), No. 40059 (July 7, 1987) (¶ 37,372).

*Carriers Traffic Servs., Inc. & Orscheln Bros. Truck Lines, Inc. v. Von Hoffmann Press, Inc.*, No. 85-C-8796 (N.D. Ill. Sept. 25, 1986).

*Consolidated Freightways Corp. of Delaware v. Sipi Metals Corp.*, No. MI-146070 (Cir. Ct. Ill. Mar. 11, 1987).

*Merchant Stor-Dor Freight Sys. v. Otis Elevator*, No. 85-C-1089, MC-C-30056, (Sept. 30, 1988).

INDIANA

*Delta Traffic Service/Campbell 66 v. Woods Wire Prods.*, No. IP-88-466-C (April 19, 1989).

LOUISIANA

*Garlepied Transfer v. Yanming Marine Line*, No. 86-3640 (E.D. La. July 30, 1987), MC-C-30069.

*Rebel Motor Freight, Inc. v. Southern Beverage Co., Inc.*, 673 F. Supp. 785 (M.D. La. 1987) (¶ 83,363).

MASSACHUSETTS

*Zayre Corp. v. Anderson Motor Lines*, No. 79-3912 (Sup. Ct. Mass. June 24, 1986), MC-C-30000.

*Branch Motor Exp. v. Ampad Corp.*, No. 86-0204-F 6. (D. Mass. Sept. 16, 1988), MC-C-30080 (¶ 37,-560).

*Branch Motor Exp. v. W.R. Grace & Co.*, No. 86-2408-Z (D. Mass. July 2, 1987), MC-C-30063, May 2, 1988 (¶ 37,486 & ¶ 37,526).

*Delta Traffic Serv., Inc. & Oneida Motor Freight, Inc. v. Translop*, No. 87-1739-WF (D. Mass. June 5, 1989).

MICHIGAN

*Maislin Indus. v. A.J. Hollander*, Nos. 83-03161, 85-0090, (Bankr. Ct. E.D. Mich. January 21, 1986); May 15, 1985; July 29, 1985; Oct. 20, 1986 (¶ 83,-311), MC-C-30013, June 30, 1988 (¶ 37,503). (ICC's decision aff'd in 4 of 41 cases, and recommended in others, proposed Order of Bankr. Ct., Dec. 9, 1988).

*Maislin Indus. v. Auto Specialties Mfg. Co.*, No. 85-0753-R (Bankr. Ct. E.D. Mich.), MC-C-30007, Feb. 16, 1988.

*Maislin Ind. U.S., Inc. v. Fort Howard Paper Co.*, Nos. 83-03161-W and 85-0822 (Bankr. Ct. E.D. Mich. Nov. 13, 1985) (amended Jan. 21, 1987), MC-C-10983.

*Clairmont Transfer Co. v. Aeroquip Corp.*, Nos. 84-00203, No. 86-0317 (Bankr. Ct. W.D. Mich. May 28, 1987).

*Tucker Freight Lines v. United Exposition*, Bky. No. HK 83-2391, Adv. No. 85-0631, 85 Bankr. 426 (W.D. Mich. April 14, 1988) (¶ 83,400).

MINNESOTA

*INF, Ltd. v. Spectro Alloys Corp.*, 651 F. Supp. 1405 (D. Minn. 1987) (ICC's decision rejected, 690 F. Supp. 808, July 18, 1988. Appeal pending in 8th Circuit).

*Gordon's Transports, Inc. v. Pickwick Int'l*, Nos. 85-20041 et al. (Minn. Dist., Hennepin County, Feb. 23, 1987), MC-C-30058.

MISSISSIPPI

*Pongetti v. Bryan Foods*, Nos. 84-10194, 86-0069 (Bankr. N.D. Miss. December 8, 1986), MC-C-30023 (ICC's finding rejected July 29, 1988 (¶ 83,399).

*Robinson Truck Lines, Inc. v. Baldor Elec. Co.*, Nos. ES84-10194, 86-0064, 0069 & 0090 (Bankr. Ct. N.D. Miss.), MC-C-30019, Jan. 20, 1988.

*Robinson Truck Lines, Inc. v. Artex Int'l, Inc.*, MC-C-30022, Apr. 1, 1988.

*Robinson Truck Lines, Inc. v. Bryan Foods*, MC-C-30023, Apr. 1, 1988 (ICC's findings not adopted July 29, 1988) (¶ 83,399).

MISSOURI

*Maislin Industries v. Primary Steel*, No. 85-0021-CV-W-1 (W.D. Mo. Sept. 3, 1985), MC-C-10961, Jan. 12, 1988 (ICC decision *aff'd*, 705 F. Supp. 1401 (1988)).

NEW JERSEY

*Branch Motor Express v. Injected Rubber Prods. Corp.*, No. 86-2417 (Sup. Ct. N.J. June 17, 1987), MC-C-30054.

*Delta Traffic Serv. and Campbell 66 v. Thomas J. Lipton, Inc.*, No. 88-1600 (D.N.J. Oct. 26, 1988), MC-C-30134.

*Southwest Freight Lines v. Wakefern Foods Corp.*, No. L-069947-8 (Sup. Ct. N.J. Jan. 31, 1986), MC-C-10991, Dec. 23, 1987.

*Delta Traffic Services (Campbell 66) v. Mennen*, No. 88-1737 (D.N.J. Oct. 28, 1988).

*Oneida v. Ormond Shops*, Nos. 85-03606, 87-0527 (Bankr. Ct. N.J. Feb. 17, 1989) (reversing prior denial at ¶ 83,425).

NEW YORK

* *International Distribution Centers v. Lady Carol Dresses*, No. 14938/83 (Sup. Ct. N.Y. June 5, 1985), MC-C-10867, Jan 2, 1985.

* *International Dist. Centers v. Rhapsody Blouse & Sportswear, Inc.*, (83 Civ. No. 2803, S.D.N.Y. June 12, 1986).

*Wilson Freight, Chief Freight Lines and Spector Red Ball v. Myers Prods.*, No. 82-5893-A (Bankr. Ct. S.D.N.Y. July 20, 1987), MC-C-30078, Jan. 11, 1989 (¶ 37,608).

NORTH CAROLINA

*Carolina Motor Express Inc., v. Delaware Valley Shippers Assoc., Inc.*, No. SH-C-87-147 (W.D.N.C. Dec. 21, 1987), MC-C-30084, Sept. 9, 1988 (¶ 37,544) (ICC decision *aff'd* Apr. 20, 1989).

*Carolina Motor Express Inc., v. California Consol. Enterprises, Inc.*, Nos. SH-B-86-00226, and 86-0498 (Bankr. Ct. W.D.N.C. Mar. 17, 1988), *rev'd* by W.D.N.C., Apr. 7, 1989 and case referred to ICC.

*Motor Carrier Audit & Collection Co. (RTC) v. Family Dollar Stores*, 670 F. Supp. 644 (W.D.N.C. 1987).

*Catawba Valley Motor Line v. Bruard's Inc.*, No. ST-C-86-154 (W.D.N.C. Feb. 25, 1987), MC-C-30039, Jan. 5, 1988.

*Delta Traffic Serv. (RTC Transp.) v. Goodmark Foods, Inc.*, No. 87-124-CIV-5 (E.D.N.C.), MC-C-30087, Dec. 20, 1988.

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* Not referred by Court to ICC as Complaint filed initially with ICC by defendant. However, the Court acknowledged the ICC's primary jurisdiction and stayed the court action.

OHIO

*Delta Traffic Serv. (Oneida) v. E.L. Mustee & Sons*, No. C-87-1726 (N.D. Ohio Sept. 30, 1987) (¶ 83,407), MC-C-30072, Apr. 13, 1988 (¶ 37,462).

*Detla Traffic Serv. (Oneida) v. AP Indus. and Goerlicks*, Nos. C-87-7444, 7436 (N.D. Ohio Dec. 28, 1988), MC-C-30099.

*Delta Traffic Serv. (Oneida) v. Synthetic Prod Co.*, No. C-87-1639 (N.D. Ohio June 20, 1988), MC-C-30066 (¶ 37,517) (ICC findings rejected Sept. 17, 1988) (¶ 37,517) (ICC findings rejected Sept. 17, 1988) (¶ 83,408).

*Delta Traffic Serv. (Oneida) v. Star Bronze Co.*, No. C-87-1716 (N.D. Ohio Dec. 12, 1988), MC-C-30096.

*Delta (RTC Transp.) v. Rubermaid*, No. C87-376A (N.D. Ohio Sept. 9, 1987), MC-C-30083, Oct. 2, 1988.

OKLAHOMA

*In re Amarex Inc.*, 74 Bankr. 378 (Bankr. Ct. W.D. Okla. 1987).

*Perry Motor Freight v. Zidell Explorations*, (N. D. Okla. Feb. 23, 1989), MC-C-30120.

OREGON

*Delta Traffic Servs. (West Coast Tr. Line) v. Marine Lumber Co.*, No. 86-1124-Ma 683 F. Supp. 754 (D. Or. 1987), MC-C-30082 June 27, 1988 (¶ 37,501) (ICC decision *aff'd* Jan. 24, 1989).

PENNSYLVANIA

*Branch Motor Express Company v. Caloric Corp.*, No. CA-86-4850 (E.D. Pa. Dec. 4, 1986), MC-C-30026, Apr. 29, 1988 (¶ 37,472) (ICC's decision rejected, Jan. 13, 1989).

*Breman's Express Co. v. Don Fisher Sales*, 69 Bankr. 356 (Bankr. Ct. W.D. Pa. 1987), MC-C-30034, Apr. 14, 1988 (¶ 83,299).

*Breman's Exp. v. Mitchell Milling*, 69 Bankr. 356 (Bankr. Ct. W.D. PA 1987), MC-C-30032, Oct. 14, 1987 (affirming ICC decision, Oct. 31, 1988) (¶ 83,416).

TENNESSEE

*Motor Carrier Audit & Collection Co. v. Manufacturers Consol. Serv.*, No. 86-2431-MA (W.D. Tenn. Dec. 12, 1986), MC-C-30025, Nov. 19, 1987 (¶ 37,417).

*Orr & Highway Express v. Sewell Plastics*, No. 86-2874 CA (W.D. Tenn. Mar. 18, 1987), MC-C-30027, Jan. 25, 1988 (¶ 37,429) (On remand, affirming ICC's decision, 703 F. Supp. 676, Nov. 17, 1988) (¶ 83,424).

*Rebel Motor Freight v. Freeman Prods.*, No. 86-2973-MA (W.D. Tenn. Mar. 11, 1987), MC-C-30015, Sept. 22, 1988 (¶ 37,558).

*Rebel Motor Freight v. Anchor Glass*, (W.D. Tenn.), MC-C-30089.

*Rebel Motor Freight v. Farrell—Calhoun Paint*, No. 18310-ITD, MC-C-30021.

*Rebel Motor Freight v. Sewell Plastics*, No. 86-2839 (W.D. Tenn.), MC-C-30021.

*Rebel Motor Freight v. Diamond-Bathurst*, No. 86-2652-MB (W.D. Tenn.), MC-C-30089, Apr. 7, 1987); Jan. 31, 1989.

TEXAS

*Motor Carrier Audit & Collection Co. (Perry Motor Freight) v. Baldor Elec. Co.*, No. CA3-85-2002R (N.D. Tex. Oct. 7, 1987), MC-C-30019 (ICC's decision rejected, July 27, 1989).

*Younger Transp. v. TMBR Drilling*, No. MO-85-CA-020 (W.D. Tex. Feb. 14, 1986), MC-C-10962, July 19, 1987.

UTAH

*IML Freight Inc. v. J.W.S. Delavau Co.*, Bankr. Case No. 83C-01950, No. 85 PC0314, MC-C-30073, Jan. 3, 1989.

*Savage Bros. v. Carlyle Johnson*, No. 86-299 (5th Jud. Dist. Jan. 9, 1988), MC-C-30107, Feb. 13, 1989.

VIRGINIA

*Scott N. Brown, Jr., Trustee v. Express Transp. Co., Inc.*, No. 89-143-N (E.D. Va. June 9, 1989).

WASHINGTON

*MC&C, Assignee of System 99 & West Coast Truck Lines v. Fisher Mills*, (W.D. Wash.), MC-C-30106, Feb. 24, 1989.

WISCONSIN

*ICX v. Klein Merchandising*, No. 86 CV 109 (Cir. Ct. Wis. Feb. 26, 1987), MC-C-30040.

*Maislin Indus. v. Packerland Packing Co.*, No. 85-C-339-S (W.D. Wis. Dec. 9, 1985) (¶ 83,248).

## APPENDIX D

## COURT DECISIONS DENYING REFERRAL OF REASONABLENESS ISSUES TO THE ICC

CALIFORNIA

*West Coast Truck Lines v. Kaiser Aluminum & Chem.*, No. C-87-0048 (N.D. Cal. July 28, 1987) (¶ 83,336).

*Milne Truck Lines & Consol./Mark v. American Licorise Co.*, No. C-88-1420 DLJ (N.D. Cal. Dec. 23, 1988).

*Wescar Freight Sys. v. Conagra, Inc.*, No. C-88-4664 SAW (N.D. Cal. Jan. 26, 1989).

COLORADO

*Motor Carrier Audit & Collection (Transp. Int'l) v. United Food Serv.*, No. 87-C-298 (D. Colo. May 4, 1987) (¶ 83,326).

*Delta Traffic Servs. v. Georgia Pac. Corp.*, 684 F. Supp. 769 (D. Conn. 1987) (¶ 83,393).

*Delta Traffic Servs. v. Cuisinarts, Inc.*, No. CA-H-87-424 (D. Conn. Oct. 28, 1987).

*Delta Traffic Servs. and Campbell 66 Express v. Purdue Frederick Co.*, No. B-88-196 (D. Conn. Mar. 8, 1989).

GEORGIA

*Feldspar Trucking Co. v. Greater Atl. Shippers, Ass'n*, 683 F. Supp. 1375 (N.D. Ga. 1987) *aff'd* by Eleventh Circuit July 20, 1988 (¶ 83,397).

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NOTE: The "¶ 37,000" series references are to Commerce Clearing House's Federal Carrier Cases reports for ICC decisions. The "¶ 80,000" series references are to CCH's court decisions in the same reports.

ILLINOIS

*Motor Carrier Audit & Collection v. Casio*, No. 6124 (N.D. Ill. Oct. 27, 1987).

*Motor Carrier Audit Collection v. Medline Ind.*, No. 6123 (N.D. Ill. Nov. 2, 1987).

*Motor Carrier Audit Collection v. Portion Packaging, Inc.*, No. 87-C-6108 (N.D. Ill. Apr. 22, 1988).

*Motor Carrier Audit Collection v. C & D Charter Power Sys.*, No. 88-C-3161 (N.D. Ill., Oct. 27, 1988).

*Transportation Int'l v. Bunge Edible Oil Corp.*, No. 86-C-9330 (N.D. Ill. May 11, 1987), *aff'd* by the Seventh Circuit July 27, 1987.

KANSAS

*Manley Truck Line v. Dataguide Business Form*, No. 87-40330-11 (D. Kan. Mar. 24, 1989).

MICHIGAN

*IMFS, Inc. v. Nekoosa Papers, Inc.*, No. G86-355 (W.D. Mich. Aug. 28, 1986).

MISSOURI

*Campbell 66 v. Transcrit Corp.*, Nos. 86-01697-S-1-11 and 88-205-S-1-11 (June 1, 1988).

MINNESOTA

*Total Transp., Inc. v. Armour & Co.*, 84 Bankr. 590 (D. Minn. Mar. 18, 1988). (¶ 83,369).

*Total Transp.. Inc. v. Portion Packaging, Inc.*, No. 6108 (N.D. Ill. Apr. 22, 1988).

*Total Transp., Inc. v. BTS Transp. Servs.*, No. 4-87-269 (Apr. 8, 1988) (¶ 83,370).

*Total Transp., Inc. v. Land O'Lakes, Inc.*, No. 4-87-227 (Bankr. Ct. Minn. Aug. 23, 1988).

*Total Transp., Inc. v. Assoc. of Milk Producers*, Nos. 4-87-215 & 276 (Bankr. Ct. Minn. May 11, 1988) (¶ 83,372).

*Indianhead Truck Lines v. Miles Home Div. of Insileo*, No. 4-86-325, (Bankr. Ct. Minn. Sept. 15, 1987) (¶ 83,372).

MISSISSIPPI

*Delta and Dudley Trucking Co. v. Armstrong World Indus.*, No. J88-0099, (S.D. Miss. Nov. 4, 1988).

NEW JERSEY

*Oneida Motor Freight, Inc. v .Felsway Corp.*, No. 87-0513 (Bankr. Ct. N.J. October 19, 1987) (¶ 83,346).

*Oneida Motor Freight, Inc. v. C & A Wallcoverings*, No. 87-0661 (Bankr. Ct. N.J. Oct. 19, 1987) (¶ 83,346).

*Oneida Motor Freight, Inc. v. Ormond Shops*, No. 87-0627 (Bankr. Ct. N.J. Oct. 19, 1987) (¶ 83,346).

*Oneida Motor Freight, Inc. v. Ormond Shops*, No. 87-0527 (Bankr. Ct. N.J. Sept. 29, 1988) (¶ 83,425), reversed on reconsideration and referred to ICC, Feb. 17, 1989.

*Oneida Motor Freight, Inc. v. Thomas J. Lipton*, No. 87-0642 (Bankr. Ct. N.J. Sept. 29, 1988) (¶ 83,425), reversed on reconsideration and referred to ICC, Feb. 17, 1989.

*Oneida Motor Freight, Inc. v. Lionel Leisure*, No. 87-0664 (Bankr. Ct. N.J. Sept. 29, 1988) (¶ 83,425), reversed on reconsideration and referred to ICC, Feb. 17, 1989.

*Oneida Motor Freight, Inc. v. C & A Wallcovering*, No. 87-0661 (Bankr. Ct. N.J. Sept. 29, 1988) (¶ 83,425), reversed on reconsideration and referred to ICC, Feb. 17, 1989.

NEW YORK

*Delta Traffic Serv. & Oneida MF v. Appo Paper & Plastics Corp.*, No. CV-87-2325 (E.D.N.Y. Nov. 2, 1988) (¶ 83,426) (Appeal Pending, 2nd Cir. No. 88-9057).

*Delta Traffic Serv. (Oneida) v. Coffee Holding Co.*, No. CV-87-2011 (E.D.N.Y. June 3, 1988) (¶ 83,394).

NORTH CAROLINA

*Carolina Motor Express Inc. v. California Consol. Enter.*, No. 86-0498 (Bankr. Ct. W.D.N.C. Mar. 25, 1987), *rev'd* (W.D.N.C. 1989).

*McLean Trucking Co. v. Allied Business Forms*, No. C-B-86-023, (Bankr. Ct. W.D.N.C. Apr. 28, 1988) (¶ 83,378).

*Observer Transp. v. Service Merchandise*, No. C-C-87-196-P (W.D.N.C. May 16, 1988) (¶ 83,418).

OHIO

*Delta Traffic Serv., Inc. (Oneida Motor Freight) v. E.L. Mustee & Sons*, No. C87-1737 (N.D. Ohio May 12, 1988).

*Delta Traffic Serv., Campbell 66) v. Sun Chem. Dispersions*, No. C-1-88-409 (S.D. Ohio Sept. 14, 1988).

*Delta Traffic Serv. (Oneida) v. Lincoln Electric Co.*, No. C-87-1744 (N.D. Ohio June 15, 1988).

OREGON

*Silver Wheel Freight Line v. AT&T Tech.*, Bankr. No. 382-03558-S7, Adv. No. 85-0743-S (D. Or. Oct. 23, 1986).

PENNSYLVANIA

*Oneida Motor Freight, Inc. v. Occidential Chem.*, No. 85-03606, No. 87-4217 (E.D. Pa. Aug. 18, 1987) (¶ 83,381).

*Oneida Motor Freight, Inc. v. Keystone Lighting*, No. 87-4217 (E.D. Pa. Sept. 23, 1987).

*Oneida Motor Freight, Inc. v. Pride Health Care*, No. 87-0915 (M.D. Pa. Nov. 18, 1987).

*Taynton Freight Systems v. Tripar Transp.*, No. 5-87-0080 (M.D. Pa. Aug. 14, 1987).

*Halls Motor Lines v. I.B.M.*, No. 88-0717 (Feb. 22, 1989).

TENNESSEE

*Delta (Campbell 66) v. Madison Mills*, No. 3-88-0315 (Dec. 22, 1988).

*Rebel Motor Freight, Inc. v. H.J. Muehlstein and Co., Inc.*, No. 87-2828-TUA (W.D. Tenn. Apr. 7, 1989) (¶ 83,449).

TEXAS

*Robert Yaquinto, Jr., Trustee for Caravan Refrigerated Cargo, Inc. v. Supreme Beef Processors, Inc.*, 864 F.2d 388 (5th Cir. 1989).

*Delta Traffic Serv. (One-Way Cartage System) v. Texas Cartage Terminal Warehouse*, No. 3-86-2904-D (N.D. Tex. June 2, 1988) (¶ 83,384).

UTAH

*Delta Traffic Serv. v. Sysco Intermountain Food Serv.*, No. 87-C-0345 (C.D. Utah Oct. 30, 1987). (After trial on the merits, Ct. dismissed the complaint, March 27-30, 1989, Written Opinion to follow).

WISCONSIN

*G.M.W. Inc. v. Certified Parts Corp.*, 135 Wis.2d 503, 400 N.W.2d 512 (Ct. App. 1986).

MOTION FILED
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No. 88-1958

# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

**SUPREME BEEF PROCESSORS, INC.**
**v.**
**ROBERT YAQUINTO, JR., TRUSTEE FOR CARAVAN REFRIGERATED CARGO, INC.**

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

## MOTION FOR LEAVE TO FILE AND BRIEF FOR AMICI CURIAE

Daniel J. Sweeney
McCarthy, Sweeney & Harkaway, P.C.
1750 Pennsylvania Ave., NW
Washington, DC 20006
Tel. (202) 393-5710

Counsel for Amici Curiae National Small Shipments Traffic Conference, Inc. and The Health and Personal Care Distribution Conference, Inc.

Frederic L. Wood*
Nicholas J. DiMichael
Richard D. Fortin
Donelan, Cleary, Wood & Maser, P.C.
1275 K Street, NW
Suite 850
Washington, DC 20005
Tel. (202) 371-9500

Counsel for Amicus Curiae The National Industrial Transportation League

*Counsel of Record

June, 1989

BEST AVAILABLE COPY

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## MOTION FOR LEAVE TO FILE JOINT BRIEF AS AMICI CURIAE

Joint Movants, The National Industrial Transportation League, National Small Shipments Traffic Conference, Inc., and Health and Personal Care Distribution Conference, Inc.(herein referred to as "Shipper Associations"), pursuant to Rule 36.1 of the Rules of this Court, hereby move for leave to file a brief as *amici curiae* in support of petitioner herein on the issue of whether the primary jurisdiction doctrine required that the courts below refer to the Interstate Commerce Commission ("ICC" or "Commission") for determination the question of whether a motor common carrier's practices were reasonable under the Interstate Commerce Act. In support of their motion, the Shipper Associations state as follows:

1. The undersigned counsel have not been able to obtain consent from respondent's counsel for the filing of the attached brief as *amici curiae*.

2. The membership of the The National Industrial Transportation League ("League") is comprised of approximately 1300 shippers and groups and associations of shippers conducting industrial and/or commercial enterprises, large, medium and small, in all States of the Union. The members of the League are substantial users of transportation by motor common carrier. It is estimated that League members, directly or indirectly, are responsible for the routing of approximately 80% of the nation's freight and the League is the only nationwide organization representing shippers of all sizes and commodities utilizing all of the various modes of transportation in moving their goods in interstate and international commerce.

3. National Small Shipments Traffic Conference, Inc. is an association with approximately 275 shipper members throughout the United States. The Health and Personal Care Distribution Conference, Inc. has a membership of approximately 70 companies which manufacture and ship drugs, medicines and personal care items throughout the nation. The members of these Conferences ship primarily via motor common carriers.

4. The Shipper Associations, *inter alia*, participate actively before administrative, judicial

and legislative bodies to advance the interests of their shipper members. The League, with the support of the other Shipper Associations and the shipping community in general, petitioned the Interstate Commerce Commission to institute a proceeding. This led to the decision in Ex Parte No. MC-177, *The National Industrial Transportation League – Petition for Rulemaking – Negotiated Motor Common Carrier Rates,* 3 I.C.C.2d 99 (1986). In this proceeding, the Interstate Commerce Commission adopted a policy whereby it would consider, on a case-by-case basis, whether it would be an unreasonable practice in violation of the Interstate Commerce Act for a motor common carrier to collect an asserted undercharge claim where the claim arose due to the carrier's failure to publish tariffs reflecting rates which the carrier represented to the shipper were in fact legally effective rates.

5. The decision of the Shipper Association's to pursue the relief reflected in the Ex Parte No. MC-177 policy statement was prompted by a groundswell among their members who were receiving proliferating "balance due" claims from the collection agents of numerous bankrupt motor carriers, or their assigns, asserting that rates originally assessed and timely paid were not reflected in published tariffs on file with the I.C.C. The members of the Shipper Associations in particular, and the shipping public in general, were outraged that the collection agents of a defunct carrier could demand monies *in addition* to the rates which the carrier represented were effective tariff

rates years after the transportation had been provided.

6. Because the Commission's policy statement was rendered in response to the League's petition for rulemaking, as supported by the other Shipper Associations, and in light of the substantial interests of the members of the Shipping Associations in establishing the obligation of the courts to apply the primary jurisdiction doctrine in the context of the Commission's policy statement, the Shipper Associations submit that there is compelling justification for this Court to grant their motion for leave to file their joint brief as *amici curiae* in support of the petition. The Shipper Associations so pray.

Respectfully submitted,

Daniel J. Sweeney
McCarthy, Sweeney & Harkaway, P.C.
1750 Pennsylvania Ave., NW
Washington, DC 20006
Tel. (202) 393-5710

Counsel for Amici Curiae
National Small Shipments Traffic Conference, Inc. and
The Health and Personal Care Distribution Conference, Inc.

Frederic L. Wood*
Nicholas J. DiMichael
Richard D. Fortin
Donelan, Cleary, Wood & Maser, P.C.
1275 K Street, NW
Suite 850
Washington, DC 20005
Tel. (202) 371-9500

Counsel for Amicus Curiae
The National Industrial Transportation League

*Counsel of Record

June, 1989

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# IN THE SUPREME COURT OF THE UNITED STATES

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**SUPREME BEEF PROCESSORS, INC.**
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

## JOINT BRIEF FOR AMICI CURIAE


Daniel J. Sweeney
McCarthy, Sweeney & Harkaway, P.C.
1750 Pennsylvania Ave., NW
Washington, DC 20006
Tel. (202) 393-5710

Counsel for Amici Curiae National Small Shipments Traffic Conference, Inc. and The Health and Personal Care Distribution Conference, Inc.

Frederic L. Wood*
Nicholas J. DiMichael
Richard D. Fortin
Donelan, Cleary, Wood & Maser, P.C.
1275 K Street, NW
Suite 850
Washington, DC 20005
Tel. (202) 371-9500

Counsel for Amicus Curiae The National Industrial Transportation League

*Counsel of Record


June, 1989

## QUESTION PRESENTED

Whether the primary jurisdiction doctrine required the referral by the courts below to the Interstate Commerce Commission of an issue involving the reasonableness of a motor carrier practice under the Interstate Commerce Act.

## Table of Contents

Page

Table of Authorities..... iii

REASONS FOR GRANTING THE WRIT..... 2

CONCLUSION ..... 7

## Table of Authorities

Page

Cases

*Arizona Grocery Co. v. Atchison, T.&S.F. Ry. Co.*, 284 U.S. 370 (1932)..... 4

*City of New Orleans v. Southern Scrap Material*, 704 F. 2d 755 (5th Cir. 1983)..... 5

*General American Tank Car Corp. v. El Dorado Term. Co.*, 308 U.S. 422 (1940)..... 6

*Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945)..... 3

*Hewitt-Robins, Inc. v. Eastern Freightways, Inc.*, 371 U.S. 84 (1962)..... 5

*ICC v. Atlantic Coast Line R. Co.*, 383 U.S. 576 (1966)..... 5

*Keogh v. Chicago & N. W. Ry. Co.*, 260 U.S. 156 (1922)..... 4

*Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94 (1915)..... 3, 4

*Seaboard System R. Co. v. United States*, 794 F. 2d 635 (11th Cir. 1986)..... 5

*United States v. Western Pacific R. Co.*, 352 U.S. 59 (1956)..... 2, 5, 6

Page

*Western Transportation v. Wilson & Co.*,
682 F. 2d 1227 (7th Cir. 1982).....5

Administrative Decisions

*The National Industrial Transportation League -- Petition for Rulemaking -- Negotiated Motor Common Carrier Rates*, 3 ICC 2d 99 (1986) ..... 3

*The National Industrial Transportation League -- Petition for Rulemaking -- Negotiated Motor Common Carrier Rates*, 5 ICC 2d 623 (1989) ..... 3

Statutes

49 U.S.C. §10701(a)..... 2

49 U.S.C. §10702(a)(2)..... 2

49 U.S.C. §11705(b)(3)..... 5

49 U.S.C. §11706(c)(2)..... 6

No. 88-1958

# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

**SUPREME BEEF PROCESSORS, INC.**
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

## BRIEF FOR AMICI CURIAE

The National Industrial Transportation League, National Small Shipments Traffic Conference, Inc. and The Health and Personal Care Distribution Conference, Inc., as *amici curiae,* respectfully urge this Court to grant the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The court of appeals affirmed a refusal by the lower courts to refer to the Interstate Commerce Commission the question of the reasonableness of the collection of additional freight charges on behalf of a motor carrier of property subject to the Interstate Commerce Act.

## REASONS FOR GRANTING THE WRIT

This case presents an important question involving the proper administration of the Interstate Commerce Act. The decision of the court of appeals is in direct conflict with controlling decisions of this Court and with decisions involving a similar issue in other courts of appeals. Its refusal to refer an issue of unreasonableness under the doctrine of primary jurisdiction was contrary to well-established and important principles of law. Review by this Court would materially assist in the resolution of conflicts involving the same issue among the lower federal courts and state courts in a large number of cases already pending and others that may be commenced in the future.

Under the Interstate Commerce Act, a motor common carrier of property has a statutory duty to establish reasonable rules and practices related to the transportation or service provided to its shippers. 49 U.S.C. §§10702(a)(2) and 10701(a). This Court has developed and applied the doctrine of primary jurisdiction in a long series of cases involving the Interstate Commerce Act and similar statutes. That doctrine allocates to the appropriate administrative agency (in this case, the ICC) the responsibility for uniformly applying the statutory duties expressed in general language in the statute to specific factual situations. *United States v. Western Pacific R. Co.*, 352 U.S. 59, 62-65 (1956). The doctrine was not followed by the courts below in this case.

The court of appeals refused to follow the primary jurisdiction doctrine and refer a reasonable practice question raised by the petitioner to the ICC because it incorrectly believed that the Act does not permit a shipper to avoid the payment of the applicable tariff charge when the motor carrier agreed to establish, but failed to publish in tariff form, another rate. The ICC, on the other hand, has followed, and has recently restated and clarified, a policy of exercising its primary jurisdiction to find, in appropriate factual circumstances, that such a course of conduct is an unreasonable practice. *The National Industrial Transportation League – Petition for Rulemaking – Negotiated Motor Common Carrier Rates,* 3 I.C.C.2d 99 (1986) and 5 I.C.C.2d 623 (1989).[1]

The court of appeals incorrectly relied on this Court's decision in *Louisville & Nashville R. Co. v. Maxwell,* 237 U.S. 94, 97 (1915). In that decision, this Court clearly articulated the classic statement that, on the one hand, a shipper was not permitted to deviate from a carrier's published tariff rate, but that, on the other hand, a shipper could still have the published rate set aside by invoking the reasonableness jurisdiction of the ICC. *Accord, Georgia v. Pennsylvania R. Co.,* 324 U.S. 439, 453 (1945), and *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.,* 284 U.S. 370, 384 (1932). But the

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[1] The clarifying decision, served on June 29, 1989, contains a comprehensive and clear exposition of the agency's views on the respective roles of the ICC and the courts in resolving these cases. 5 I.C.C. 2d at 624-31.

court of appeals, in citing the relevant passage from the *Maxwell* case, inexplicably omitted the crucial language in Justice Hughes' opinion[2] that explicitly stated that the ICC had the authority to find a published tariff rate to be unreasonable. *Compare* 237 U.S. at 97 *with* 864 F.2d at 390 (reprinted in petitioner's appendix, p. B-5).[3]

The court of appeals thus negated one of the most important means for the Commission to exercise its authority to enforce the duty of motor common carriers to establish reasonable rates and practices. Congress has authorized the agency *alone* to make findings that form the basis of an award of damages to injured shippers in the form of reparations for unreasonable rates or practices. 49

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2 Incorrectly attributed by the court of appeals to Justice Brandeis. Petitioner's appendix p. B-4. However, in another case, Justice Brandeis also clearly stated the ICC's authority to set aside or suspend a published tariff. *Keogh v. Chicago & N. W. Ry. Co.* 260 U.S. 156, 163 (1922).

3 The passage involved from *Maxwell*, at 237 U.S. 97, states:

> The rate of a carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, *unless it is found by the Commission to be unreasonable.*

[emphasis added.] The italicized language, which was omitted by the court of appeals, is not mere surplusage, but is an important principle regarding the role of the ICC in exercising its statutory authority to enforce the duties imposed by the Act on carriers.

U.S.C. §11705(b)(3) and *Hewitt-Robins, Inc. v. Eastern Freightways, Inc.*, 371 U.S. 84 (1962). Moreover, it is abundantly clear that only the *ICC* and not the courts may make a finding that a particular motor carrier practice is unreasonable, so as to preclude the collection of rates published in the otherwise applicable tariff. *ICC v. Atlantic Coast Line R. Co.*, 383 U.S. 576, 579-80 (1966) and *Western Transportation v. Wilson & Co.*, 682 F.2d 1227, 1232 (7th Cir.1982).

The court of appeals, by refusing to refer the unreasonable practice defense raised by petitioner to the ICC, is not recognizing the right of shippers being sued by a carrier for undercharges to oppose the claim with a contention that it would be unreasonble under the Act to permit the collection of the otherwise applicable tariff charges. *United States v. Western Pacific R. Co., supra,* and *Seaboard System R. Co. v. United States,* 794 F.2d 635, 637-8 (11th Cir. 1986).[4]

By refusing to direct the referral to the ICC of the petitioner's claim that the collection of additional freight charges in the particular circumstances involved would be an unreasonable

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4 The court of appeals was plainly wrong in distinguishing this decision on the grounds that referral is only appropriate when the tariff at issue is ambiguous. Petitioner's appendix p. B-10-11. The Eleventh Circuit approved the ICC's finding that the tariff must be considered unambiguous, but nonetheless affirmed the ICC's finding that it would be an unreasonable practice to allow the carrier to collect the additional freight charges. 794 F.2d at 637-38.

practice, the court of appeals has violated the primary jurisdiction doctrine by securing for itself the exclusive power vested in the ICC to make that determination. *United States v. Western Pacific R. Co., supra,* 352 U.S. at 63-65 and *General American Tank Car Corp. v. El Dorado Term. Co.,* 308 U.S. 422, 432-33 (1940). The ICC *must* have the first opportunity to determine the reasonableness of the practices engaged in by the motor carrier.

This Court has regarded "the maintenance of a proper relationship between the courts and the Commission in matters affecting transportation to be of continuing public concern." *United States v. Western Pacific R. Co., supra,* 352 U.S. at 63. As detailed in the petition,[5] a large number of cases involving identical issues, many with conflicting views on the application of the primary jurisdiction doctrine, are pending in the lower federal and state courts. In order to provide a clear direction as to the nature of that relationship for the benefit of all of those courts considering this and similar cases, review of the court of appeals decision in this case is essential.

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5 Petitioner's Appendices G and H

## CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

Daniel J. Sweeney
McCarthy, Sweeney & Harkaway, P.C.
1750 Pennsylvania Ave., NW
Washington, DC 20006
Tel. (202) 393-5710

Counsel for Amici Curiae National Small Shipments Traffic Conference, Inc. and The Health and Personal Care Distribution Conference, Inc.

Frederic L. Wood*
Nicholas J. DiMichael
Richard D. Fortin
Donelan, Cleary, Wood & Maser, P.C.
1275 K Street, NW
Suite 850
Washington, DC 20005
Tel. (202) 371-9500

Counsel for Amicus Curiae The National Industrial Transportation League

*Counsel of Record

June, 1989

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CLERK

No. 88-1958

# In the Supreme Court of the United States

OCTOBER TERM, 1989

SUPREME BEEF PROCESSORS, INC., PETITIONER

v.

ROBERT YAQUINTO, JR., TRUSTEE FOR
CARAVAN REFRIGERATED CARGO, INC.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
*Solicitor General*
THOMAS W. MERRILL
*Deputy Solicitor General*
MICHAEL R. DREEBEN
*Assistant to the Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

ROBERT S. BURK
*General Counsel*
ELLEN D. HANSON
*Associate General Counsel*
CECELIA E. HIGGINS
*Attorney*
*Interstate Commerce Commission*
*Washington, D.C. 20423*

## QUESTIONS PRESENTED

1. Whether, in a motor carrier's civil action against a shipper for undercharges based on a filed tariff rate, a court is required under the primary jurisdiction doctrine to refer to the Interstate Commerce Commission the question whether the carrier's assessment of the tariff rate would involve an unreasonable practice in violation of 49 U.S.C. 10701(a).

2. Whether the court of appeals correctly held that petitioner's "government-carrier" defense was not asserted in a timely way when raised for the first time on a motion for reconsideration.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Statement | 1 |
| Discussion | 5 |
| Conclusion | 19 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *A.J. Poor Grain Co.* v. *Chicago, B.&O. Ry.*, 12 I.C.C. 418 (1907) | 11 |
| *Acceptable Forms of Requests for Operating Authority*, 133 M.C.C. 328 (1984), aff'd and rev'd *sub nom. American Trucking Ass'ns* v. *ICC*, 659 F.2d 452 (1981), mandate enforced, 669 F.2d 957 (5th Cir. 1982) cert. denied, 460 U.S. 1022 (1983) | 9 |
| *American Trucking Ass'ns* v. *Atchison T.&S.F. Ry.*, 387 U.S. 397 (1967) | 12 |
| *Arizona Grocery Co.* v. *Atchison, T.&S.F. Ry.*, 284 U.S. 370 (1932) | 7, 15 |
| *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981) | 6 |
| *Baltimore & O.R.R.* v. *United States*, 305 U.S. 507 (1939) | 11 |
| *Burlington Northern Inc.* v. *United States*, 459 U.S. 131 (1982) | 15, 16 |
| *Carriers Traffic Serv., Inc.* v. *Anderson, Clayton & Co.*, 881 F.2d 475 (7th Cir. 1989) | 16 |
| *Central & Southern Motor Freight Tariff Ass'n* v. *United States*, 757 F.2d 301 (D.C. Cir.), cert. denied, 474 U.S. 1019 (1985) | 9, 14 |
| *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U.S. 285 (1922) | 7, 14 |

Cases—Continued: Page

*Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962) ..... 7-8, 14, 16, 17
*ICC* v. *American Trucking Ass'ns*, 467 U.S. 354 (1984) ..... 12
*ICC* v. *Atlantic Coast Line R.R.*, 383 U.S. 576 (1966) ..... 7, 17
*ICC* v. *Illinois C.R.R.*, 215 U.S. 452 (1910) ..... 8
*INF, Ltd.* v. *Spectro Alloys Corp.*, 881 F.2d 546 (8th Cir. 1989) ..... 17
*Informal Procedure for Determining Motor Carrier and Freight Forwarder Reparation*, 335 I.C.C. 403 (1969) ..... 16
*Keogh* v. *Chicago & Northwestern Ry.*, 260 U.S. 156 (1922) ..... 11, 14
*Louisville & Nashville R.R.* v. *Central Iron & Coal Co.*, 265 U.S. 59 (1924) ..... 7
*Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. 94 (1915) ..... 3, 6, 11
*Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516 (1939) ..... 7, 16
*Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 879 F.2d 400 (8th Cir. 1989), petition for cert. pending, No. 89-624 ..... 5, 6, 13, 17
*Mitchell Coal & Coke Co.* v. *Pennsylvania R.R.*, 230 U.S. 247 (1913) ..... 7
*Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290 (1976) ..... 7
*National Indus. Transp. League—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986) ..... 4, 9, 10, 12
*New York, N.H.&H.R.R.* v. *ICC*, 200 U.S. 361 (1906) ..... 6
*Northern Pacific Ry.* v. *Solum*, 247 U.S. 477 (1918) ..... 8
*Pennsylvania R.R.* v. *International Coal Mining Co.*, 230 U.S. 184 (1913) ..... 15

Cases – Continued: Page

*Pennsylvania R.R.* v. *United States*, 363 U.S. 202 (1960) ..... 14, 16, 17
*Petition for Voluntary Order – Lawfulness of Volume Discount Rates – Motor Common Carrier of Property*, 365 I.C.C. 711 (1982) ..... 9
*Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I.C.C.2d 623 (1989) ..... 5, 13
*Pittsburgh, C.C. & St. L. Ry.* v. *Fink*, 250 U.S. 577 (1919) ..... 7
*Rates for a Named Shipper or Receiver*, 367 I.C.C. 959 (1984) ..... 9
*Regular Common Carrier Conference* v. *United States*, 793 F.2d 376 (D.C. Cir. 1986) ..... 13
*Seaboard System R.R.* v. *United States*, 794 F.2d 635 (11th Cir. 1986) ..... 4, 13
*Short Notice Effectiveness for Independently Filed Motor Carrier and Freight Forwarder Rates*, 1 I.C.C.2d 146 (1984), aff'd *sub nom. Southern Motor Carriers Rate Conference* v. *United States*, 773 F.2d 1561 (11th Cir. 1985) ..... 9
*Southern Pacific Transportation Co.* v. *Commercial Metals Co.*, 456 U.S. 336 (1982) ..... 6, 13
*Southern Pacific Transportation Co.* v. *San Antonio*, 748 F.2d 266 (5th Cir. 1984) ..... 4, 15
*Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986) ..... 4, 13, 14
*Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) ..... 7
*T.I.M.E. Inc.* v. *United States*, 359 U.S. 464 (1959) ..... 16
*United States* v. *Associated Transp., Inc.*, 505 F.2d 366 (D.C. Cir. 1974) ..... 16
*United States* v. *Western Pacific R.R.*, 352 U.S. 59 (1956) ..... 7
*Western Transp. Co.* v. *Wilson & Co.*, 682 F.2d 1227 (7th Cir. 1982) ..... 16

Statutes and regulation: Page

Act of Sept. 6, 1965, Pub. L. No. 89-170, §§ 6-7, 79 Stat. 651-652 ..... 16
Act of Oct. 17, 1978, Pub. L. No. 95-473, § 3, 92 Stat. 1466 ..... 8
Hepburn Act of 1906, ch. 3591, § 4, 34 Stat. 589 .. 7
Interstate Commerce Act, 49 U.S.C. 10101 *et seq.* ..... 1
49 U.S.C. 10101 ..... 8
49 U.S.C. 10101 note ..... 8
49 U.S.C. 10101(a)(2) ..... 12
49 U.S.C. 10701(a) ..... 1, 2, 7, 8, 14
49 U.S.C. 10702(b) ..... 14
49 U.S.C. 10704(b)(1) (1982 & Supp. V (1987) ..... 1-2, 8
49 U.S.C. 10721 ..... 3
49 U.S.C. 10761(a) ..... 1, 3, 6, 12
49 U.S.C. 10761(b) ..... 14
49 U.S.C. 10762(a)(1) ..... 1, 12
49 U.S.C. 11701(b) (1982 & Supp. V 1987) ... 15
49 U.S.C. 11902 ..... 12
49 U.S.C. 11903 ..... 12
Interstate Commerce Act (Act of Feb. 4, 1887), ch. 104, 24 Stat. 379 ..... 6, 7
Mann-Elkins Act of 1910, ch. 309, § 7, 36 Stat. 546 8
Motor Carrier Act of 1935, ch. 498, 49 Stat. 543:
§ 216(b), 49 Stat. 558 (49 U.S.C. 316 (1976)) .. 8
§ 218, 49 Stat. 561 ..... 14
Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 ..... 3
§ 4, 94 Stat. 793 ..... 12
§ 10(b), 94 Stat. 800 ..... 8
28 U.S.C. 1336(b) ..... 17
49 C.F.R. 1312.39(h)(1) ..... 9

Miscellaneous: Page

H.R. Rep. No. 253, 89th Cong., 1st Sess. (1965) .. 16

H.R. Rep. No. 1069, 96th Cong., 2d Sess. (1980) .. 8

1987 ICC Ann. Rep. ..... 8

# In the Supreme Court of the United States

OCTOBER TERM, 1989

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No. 88-1958

SUPREME BEEF PROCESSORS, INC., PETITIONER

v.

ROBERT YAQUINTO, JR., TRUSTEE FOR
CARAVAN REFRIGERATED CARGO, INC.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

### STATEMENT

1. The Interstate Commerce Act, 49 U.S.C. 10101 *et seq.*, regulates interstate transportation by motor carriers. A carrier providing transportation subject to regulation under the Act may do so only if the carrier has an effective tariff on file with the ICC. 49 U.S.C. 10761(a), 10762(a)(1). In order to protect shippers against discriminatory rates, the Act further provides that a carrier "may not charge or receive a different compensation for that transportation * * * than the rate specified in the tariff." 49 U.S.C. 10761(a). The Act also imposes a requirement that a carrier's "rate[s]" and "practice[s]" be reasonable. 49 U.S.C. 10701(a). The authority to enforce the requirement of reasonable rates and practices is reposed in the ICC. 49 U.S.C.

10704(b)(1) (1982 & Supp. V 1987). If the ICC determines that a carrier is engaging in a practice that is or will be unreasonable, the ICC "shall prescribe the * * * practice to be followed" by the carrier. 49 U.S.C. 10704(b)(1) (1982 & Supp. V 1987).

2. Petitioner is a major supplier of beef products to the United States government. For several years prior to its bankruptcy, Caravan Refrigerated Cargo, Inc. (Caravan), a motor common carrier, provided refrigerated trucking services to petitioner. Petitioner and Caravan had a longstanding agreement that Caravan would "meet or beat" any rate quoted by a competing motor carrier. Through this arrangement, Caravan secured a steady source of transportation business, and petitioner obtained the assurance of low-cost shipping. Pet. App. B2.

To keep up with changing competitive conditions, petitioner and Caravan continually renegotiated rates. Petitioner relied on the various rates quoted to it by Caravan, and it paid Caravan's bills at those rates. In many instances, however, Caravan failed to file the negotiated rates in tariffs with ICC. As a result, the rates actually quoted and billed to petitioner were significantly lower than those set forth in the applicable tariffs. Petitioner maintains that at the time of the shipments in question it was not aware that Caravan's quoted rates differed from the tariff rates. Pet. App. B2, D2.

3. After Caravan declared bankruptcy, Caravan's trustee filed an adversary action in bankruptcy court to collect the difference between Caravan's tariff rates and the negotiated rates at which petitioner had originally been billed. Pet. App. D2. Petitioner filed an answer and counterclaim, alleging, *inter alia*, that Caravan's conduct in negotiating and charging, but failing to file, its transportation rates constituted an unreasonable practice in violation of 49 U.S.C. 10701(a). Caravan requested the bankruptcy court to refer that issue to the ICC under the primary jurisdiction doctrine. The bankruptcy court, however, denied referral, reasoning that the ICC could provide only advisory findings, and, consequently, that referral would simply result in delay. Pet. App. F1-F2. After the matter was trans-

ferred to the district court, petitioner moved again for referral of the unreasonable-practice issue to the ICC; that motion was also denied. *Id.* at E1-E2. Thereafter, the district court granted summary judgment in favor of the trustee, rejecting petitioner's contention that the rates it had negotiated with Caravan should prevail over the filed rates. *Id.* at D1-D6.[1]

4. The court of appeals affirmed. The court noted that the primary jurisdiction doctrine requires a court to refer to the ICC an issue that falls within the agency's exclusive competence, thereby permitting the agency to apply its expertise and ensuring the uniform development of policy. The court believed, however, that those considerations were not implicated here because the question was simply whether the trustee's claim was governed by 49 U.S.C. 10761(a), which requires a carrier to collect only those rates set forth in its published tariffs. Pet. App. B4. That issue, the court explained, does not bring into play the ICC's primary jurisdiction because, under the "filed rate" doctrine, the Interstate Commerce Act has long been construed to preclude equitable defenses to the tariff rate based on "[i]gnorance or misquotation of rates." Pet. App. B4-B5 (quoting *Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915)).

The court found no reason for departing from the filed rate doctrine here. The court dismissed arguments that the pro-competition transportation policy expressed in the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, authorized some modification of the filed rate doctrine. The court noted that Congress had thoroughly examined the regulation of transportation policy in amending the Interstate Commerce Act in 1980, but had left untouched the provisions governing the observance of filed rates. Consequently, the court believed, any modification of the filed rate doctrine must emanate from

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[1] After entry of judgment, petitioner filed a "motion to reconsider," arguing for the first time that, pursuant to 49 U.S.C. 10721, no tariffs were required to be filed for the shipments in question because they were destined for the government. Pet. App. C1-C2. The court considered it "improper" for this argument to be raised after the entry of final judgment, and, alternatively, found it without merit. *Ibid.*

Congress, not the courts. Pet. App. B6-B7 (citing *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986)).

The court also rejected petitioner's reliance on the ICC's recent policy statement in *National Indus. Transp. League—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986) [hereinafter *Negotiated Rates I*], in which the ICC announced that it would accept referrals from district courts to determine whether it would be an unreasonable practice for a motor carrier to collect a tariff rate that exceeds a negotiated rate originally charged. The court interpreted *Negotiated Rates* to express the agency's willingness to hear "equitable" defenses to the filed rate doctrine, and concluded that this policy "has, of course, no binding effect upon this court." Pet. App. B8. Instead, the court found the case to be governed by *Southern Pacific Transportation Co.* v. *San Antonio*, 748 F.2d 266 (5th Cir. 1984), which held that a court cannot stay a carrier's tariff collection action pending the outcome of an ICC proceeding to determine the reasonableness of the tariff rate; in such circumstances, the *San Antonio* court stated, the shipper's only remedy is to seek reparations from the carrier in a separate proceeding. *Id.* at 274. The court believed that the same principle precluded referral to the ICC of a shipper's defense that collection of the filed rate would constitute an unreasonable practice.

Finally, the court distinguished the Eleventh Circuit's decision in *Seaboard System R.R.* v. *United States*, 794 F.2d 635, 637 (1986). The court acknowledged that in *Seaboard* the Eleventh Circuit upheld the ICC's application of its unreasonable practice authority to limit the collection of a filed rate. But the court read *Seaboard* to turn on the ICC's conclusion that collection of the tariff rate was barred because the carrier had misquoted a tariff that was not clear on its face. The court thought that the ICC's ability to preclude collection of a filed rate was limited to those circumstances. Pet. App. B10-B11.[2]

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[2] The court also rejected petitioner's contention that the district court had erroneously refused to consider its government-carrier defense on grounds that it was untimely. Pet. App. B12-B13.

## DISCUSSION

This case reflects a widespread problem in the motor carrier industry. Following the substantial deregulation of the industry in the Motor Carrier Act of 1980, increased competition has led to a number of bankruptcy filings by motor carriers. Numerous cases have been filed by carriers (or their receivers) seeking to collect undercharges in factual settings virtually identical to this case. The ICC has responded to this problem by issuing two policy statements. In *Negotiated Rates I*, the ICC declared that it would accept court referrals to determine whether the collection of tariff rates in excess of negotiated rates is an unreasonable practice. In *Petition to Institute Rulemaking on Negotiated Motor Carrier Rates*, 5 I.C.C.2d 623, 626 (1989) [hereinafter *Negotiated Rates II*], the ICC clarified and reaffirmed that policy and went on to say that it would also entertain such claims as an initial matter, without court referral.[3]

We agree with petitioner (Reply Br. 1-2) that the court of appeals' holding—that a district court is not required to refer a shipper's unreasonable-practice claim to the ICC under the primary jurisdiction doctrine—conflicts with the Eighth Circuit's holding in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 879 F.2d 400 (1989), petition for cert. pending, No. 89-624. We also agree with petitioner that the ICC's *Negotiated Rates* policy has been a sufficient source of controversy in the lower courts to warrant this Court's review. Although both this case and *Maislin* present the primary jurisdiction question that has generated this controversy, we believe that *Maislin* may provide the better vehicle for review because the record there, unlike the instant case, includes the Commission's assessment of the facts and its conclusion that an unreasonable practice was committed. Accordingly, we recommend that the Court grant the petition in *Maislin* (in which the ICC is a party respondent) and hold the petition in this case for disposition in accordance

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[3] *Negotiated Rates II* was issued after the decision in this case.

with the decision in *Maislin*.[4]

1. a. The Interstate Commerce Act requires that carriers file their rates in public tariffs and charge and collect only the filed rates.[5] This requirement was designed to prevent carriers from engaging in rate discrimination that favored some shippers over others. See, *e.g.*, *New York, N.H.&H.R.R.* v. *ICC*, 200 U.S. 361, 391 (1906); *Southern Pacific Transportation Co.* v. *Commercial Metals Co.*, 456 U.S. 336, 343-344 (1982). In a series of cases decided in the early part of this century, the Court developed the principle that neither misquotation by the carrier nor the shipper's ignorance of the tariff rate afforded a defense to the carrier's court action to collect the filed rate (a principle that later came to be called the "filed rate" doctrine).[6] As stated in *Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915):

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed.

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[4] We have filed a brief urging the Court to grant the petition in *Maislin* and have provided a copy to the parties here.

If the Court does grant the petition in this case to review the proper application of the primary jurisdiction doctrine, we believe it should deny the petition as to the third question presented (Pet. (i)): whether the district court properly rejected petitioner's untimely effort to raise a government-carrier defense. There is no circuit conflict on this point, and petitioner's quarrel with the lower courts raises, at most, a claim of abuse of discretion. Indeed, the court of appeals' affirmance of the district court's ruling on this point (Pet. App. B12-B13) was correct, as petitioner has not explained its failure to raise the defense until its motion for reconsideration.

[5] See Act To Regulate Commerce of 1887, ch. 104, 24 Stat. 379. The current codification of this requirement, as applied to the motor common carriers, is found at 49 U.S.C. 10761(a).

[6] See *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 599 (1981) (Stevens, J., dissenting).

See also *Pittsburgh, C.C.& St. L. Ry.* v. *Fink*, 250 U.S. 577, 582 (1919); *Louisville & Nashville R.R.* v. *Central Iron & Coal Co.*, 265 U.S. 59, 65 (1924); *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939).

*Maxwell*, however, sets forth an important qualification to the filed rate doctrine: the filed rate governs "unless it is found by the Commission to be unreasonable." 237 U.S. at 97. That qualification reflects not only the statutory command that a carrier's rates must be reasonable, 49 U.S.C. 10701(a), but also the parallel principle that the Commission alone can determine the reasonableness of rates. *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *Arizona Grocery Co.* v. *Atchison, T.&S.F. Ry.*, 284 U.S. 370 (1932) (distinguishing "legal" rates, defined as those stated in the carrier's tariff, from "lawful" rates, representing those determined by the ICC to be reasonable).

The competing demands of the filed rate doctrine and the statutory standard of reasonableness have been reconciled largely through the development of the doctrine of primary jurisdiction. That doctrine requires that "[w]henever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission." *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291 (1922). The doctrine protects the uniform development of policy by the ICC and ensures application of the agency's expertise to questions requiring intimate familiarity with conditions of the regulated industry. *Mitchell Coal & Coke Co.* v. *Pennsylvania R.R.*, 230 U.S. 247, 255-259 (1913); *United States* v. *Western Pacific R.R.*, 352 U.S. 59, 63-64 (1956); *ICC* v. *Atlantic Coast Line R.R.*, 383 U.S. 576, 580, 594 (1966); *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 304 (1976). Moreover it is clear that the primary jurisdiction doctrine governs not only a claim that a carrier's *rates* are unreasonable, but also a similar claim directed at its *practices*.[7] *Hewitt-Robins Inc.* v. *Eastern*

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[7] Congress did not address the question of unreasonable carrier "practices" in the original Interstate Commerce Act (Act of Feb. 4, 1987), ch. 104, 24 Stat. 379. In the Hepburn Act of 1906, ch. 3591, § 4, 34 Stat. 589, Congress gave

*Freight-Ways, Inc.*, 371 U.S. 84, 87 (1962) (primary jurisdiction applies to a claim that a carrier's misrouting constitutes an unreasonable practice); *Northern Pacific Ry.* v. *Solum*, 247 U.S. 477, 483 (1918) ("the rule which requires * * * preliminary determination of administrative questions by the Commission applies * * * to any practice of the carrier which gives rise to the application of a rate"). Upon a determination that a carrier has committed an unreasonable practice, the Commission is empowered, as it is where it makes a finding of unreasonable rates, to prescribe an appropriate practice to be followed in the future. See 49 U.S.C. 10704(b)(1) (1982 & Supp. V 1987).

b. The ICC's *Negotiated Rates* policy was formulated against the background of the foregoing principles. The policy stems from the ICC's experience under the more competitive environment introduced by the Motor Carrier Act of 1980. The 1980 Act significantly relaxed entry requirements, causing the number of licensed motor common carriers to double.[8] The Act also permitted carriers to operate in both a common and contract capacity, thereby freeing them to tailor rates to individual shippers.[9] In recent years, the ICC has also routinely given com-

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conferred power upon the Commission to determine whether a railroad carrier's practices were unreasonable and to prescribe a different practice for the future. See *ICC* v. *Illinois C.R.R.*, 215 U.S. 452, 475-477 (1910). In the Mann-Elkins Act of 1910, ch. 309, § 7, 36 Stat. 546, Congress extended that principle by imposing a duty on all rail carriers to engage in "just and reasonable * * * practices." When Congress gave the Commission authority to regulate motor carriers in 1935, it applied the same dual requirement that motor carriers establish and observe reasonable rates and practices. Motor Carrier Act of 1935, ch. 498, § 216(b), 49 Stat. 558 (codified at former 49 U.S.C. 316 (1976)). In 1978, Congress revised, codified, and enacted Title 49 of the United States Code into positive law, without substantive change (Act of Oct. 17, 1978, Pub. L. No. 95-473, § 3, 92 Stat. 1466, 49 U.S.C. 10101 note), consolidating in one section the requirement of reasonable rates and practices for all carriers the Commission regulates. 49 U.S.C. 10701(a).

[8] Prior to the Motor Carrier Act of 1980, there were approximately 17,000 regulated motor common carriers. H.R. Rep. No. 1069, 96th Cong., 2d Sess. 12 (1980). In 1987, there were over 35,000 such carriers. 1987 ICC Ann. Rep. 125, App. E, Table 1.

[9] The Motor Carrier Act of 1980, Pub. L. No. 96-296, § 10(b), 94 Stat. 800, repealed the limitations on a carrier's ability to hold both common and con-

mon carriers broader operating authority than it did previously,[10] and has permitted pricing activities that once were considered unlawful, including volume discounts and common carrier rates that are specifically limited to a named shipper.[11]

As a consequence, carriers today regularly offer discounts from their published rates to particular shippers. For their part, shippers regularly tender freight in reliance on these offers. The ICC has sought to facilitate competitive setting of rates by allowing motor carriers to file tariffs independently lowering their rates on one day's notice.[12] 49 C.F.R. 1312.39(h)(1). Nevertheless, it is clear that some common carriers have failed to file their individually negotiated rates with the ICC. See *Negotiated Rates I*, 3 I.C.C.2d at 104-105. In the wake of bankruptcies by trucking companies, auditors have frequently found that the rates billed and collected were not the applicable rates on file at the ICC. These discoveries have led to numerous legal actions by receivers or trustees seeking recovery of undercharges from unsuspecting shippers. See Shippers National Freight Claims Council, Inc. Amicus Br. 3-4.

As these collection actions became more common, a national shippers' association asked the ICC to address the problem.[13]

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tract carrier authority. A contract carrier may charge a rate to an individual shipper that is different from the rate charged other, similarly situated shippers. *Central & Southern Motor Freight Tariff Ass'n* v. *United States*, 757 F.2d 301, 310 n.44 (D.C. Cir.), cert. denied, 474 U.S. 1019 (1975).

[10] A carrier may now readily obtain authority to transport virtually all commodities throughout the contiguous 48 states. See *Acceptable Forms of Requests for Operating Authority*, 133 M.C.C. 328 (1984), aff'd in relevant part and rev'd on other grounds *sub nom. American Trucking Ass'ns* v. *ICC*, 659 F.2d 452 (5th Cir. 1981), mandate enforced, 669 F.2d 957 (5th Cir. 1982), cert. denied, 460 U.S. 1022 (1983).

[11] See *Petition for Voluntary Order—Lawfulness of Volume Discount Rates—Motor Common Carrier of Property*, 365 I.C.C. 711 (1982), and *Rates for a Named Shipper or Receiver*, 367 I.C.C. 959 (1984).

[12] *Short Notice Effectiveness for Independently Filed Motor Carrier and Freight Forwarder Rates*, 1 I.C.C. 2d 146 (1984), aff'd *sub nom. Southern Motor Carriers Rate Conference* v. *United States*, 773 F.2d 1561 (11th Cir. 1985).

[13] The association proposed a rule declaring that whenever a carrier and shipper have negotiated a rate and the carrier then fails to file an appropriate

In *Negotiated Rates I*, the ICC responded by announcing that it would conduct an "advisory analysis," on referral from a court under the primary jurisdiction doctrine, to "determine * * * whether collection of undercharges based on the rate contained in the filed tariff would constitute an unreasonable practice and, if a negotiated rate is found to exist, whether this amount is all the carrier should be permitted to collect." 3 I.C.C.2d at 107.

The courts' response to *Negotiated Rates I* has been mixed. Some courts, like the court of appeals here, have viewed the ICC's policy statement as simply offering to render an "advisory opinion," and have declined to accord the statement it any weight. Other courts have accepted the invitation to refer unreasonable practice claims to the ICC, and have concluded that the Commission's determinations are binding unless set aside under traditional standards governing judicial review of agency action. Compare Shippers National Freight Claims Council, Inc. Amicus Br. App. 8a-17a with *id.* at 18a-23a.

To clarify its policy and to respond to another petition from a shippers' association, the Commission issued a second statement in *Negotiated Rates II, supra.* This statement explained that the ICC's source of authority for its negotiated rates policy is the statutory requirement that a carrier's practices must be reasonable; consequently, its determinations constitute a legal, rather than an "equitable," defense. 5 I.C.C.2d at 628 & n.11. Moreover, to remove any confusion resulting from use of the term "advisory opinion" in *Negotiated Rates I*, the ICC also explained that its determinations result in "binding and dispositive" orders, subject to review only for arbitrariness and caprice. *Id.* at 624, 625. Finally, to protect its jurisdiction in light of the refusal of some courts to refer such claims, the ICC announced that it would rule on negotiated-rates allegations by shippers without awaiting court referral. *Id.* at 635-636.

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tariff, the negotiated rate is the maximum reasonable rate that the carrier may charge, provided that the shipper entertained a good-faith belief that the negotiated rate was legally applicable. The Commission rejected that proposal in favor of a case-by-case examination of a carrier's practices. 3 I.C.C.2d at 102-103.

2. Contrary to the court of appeals, we do not believe that the filed rate doctrine forecloses reference to the ICC of unreasonable-practice claims under its *Negotiated Rates* policy. In our view, analysis of this issue embraces two interrelated questions: (1) whether the ICC has authority to determine that a motor carrier is committing an unreasonable practice by negotiating and charging a shipper a rate that it fails to file in a tariff with the ICC, and then at a later date seeking to recover from the shipper the higher rate actually reflected in the filed tariff; and (2) whether a federal court should stay a tariff collection action by a carrier pending a determination by the ICC whether such an unreasonable practice has occurred.

a. This Court's many decisions holding that a *court* may not recognize equitable defenses to a carrier's right to collect a filed tariff do not qualify the *Commission*'s power to implement the statutory requirement of reasonableness. To the contrary, that power has long been recognized as a co-equal requirement of the Act. See *Maxwell,* 237 U.S. at 97; *Keogh* v. *Chicago & Northwestern Ry.,* 260 U.S. 156, 163 (1922) (the tariff rate governs "[u]nless and until suspended or set aside" by the ICC). For courts to determine in individual cases whether enforcement of the filed rate is inequitable would seriously undermine the ICC's primary jurisdiction and would give rise to a lack of uniformity in application of the statute. Those considerations, however, are absent when the ICC itself determines that a carrier has committed an unreasonable practice that bars its collection of the filed rate.

It is true that the ICC has historically rejected claims that misquotation of rates impairs the carrier's right to collect the filed rate. See *A.J. Poor Grain Co.* v. *Chicago, B.&O. Ry.,* 12 I.C.C. 418, 422-423 (1907). That rule was deemed necessary to implement the strong emphasis of the original Interstate Commerce Act on preventing discrimination among shippers. Indeed, in its early administration of the Act, the ICC used its unreasonable practice jurisdiction to enforce the antidiscrimination rules governing carriers. See *Baltimore & O.R.R.* v. *United States,* 305 U.S. 507, 521-522 (1939). But the Commission's un-

reasonable practice jurisdiction is not confined to its early scope. The Commission is free to revise its interpretation of the statutory provisions it administers to respond to changed conditions. *American Trucking Ass'ns* v. *Atchison, T.&S.F. Ry.*, 387 U.S. 397, 416 (1967); *Maislin*, 879 F.2d at 405-406. That principle has particular force here, in light of Congress's substantial amendment of the transportation policy of the United States in the Motor Carrier Act of 1980.

The 1980 Act directs the ICC to apply a new policy of "promot[ing] competitive and efficient transportation services," in order to achieve, among other things, "a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping * * * public."[14] This Court has recognized that "[t]he legislative history of the Act is clear that * * * Congress wanted the forces of competition to determine motor-carrier tariffs." *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354, 367 (1984). The changes wrought by the 1980 Act support the ICC's conclusion that "our former policy of penalizing shippers for carriers' mistakes regardless of the circumstances is unnecessary and inappropriate to deter discrimination under today's statutory scheme." *Negotiated Rates I*, 3 I.C.C.2d at 105.

The ICC's *Negotiated Rates* policy does not suggest that carriers are free to disregard their statutory obligation to file rates in proper tariffs with the ICC (49 U.S.C. 10762(a)(1)), nor does it announce a universal rule that a negotiated rate prevails over a filed rate (49 U.S.C. 10761(a)).[15] Compare *Regular Common*

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[14] Motor Carrier Act of 1980, Pub. L. No. 96-296, § 4, 94 Stat. 794 (codified at 49 U.S.C. 10101(a)(2)).

[15] Nor does the ICC's policy transgress other provisions that support the filed rate requirement. The Act creates civil liability for a shipper's knowing receipt of a rebate (49 U.S.C. 11902) and criminal liability for the knowing provision or receipt of transportation at below-tariff rates (49 U.S.C. 11903). A shipper that violates those provisions by *knowingly* paying a negotiated but unfiled transportation rate would be barred from taking advantage of the Commission's *Negotiated Rates* policy, because reliance on the applicability of the negotiated rate must be reasonable. And a carrier that violates those provisions is hardly in a position to complain if it is later denied the windfall of a higher tariff rate that exists only because it ignored its duty to make a timely tariff filing.

*Carrier Conference* v. *United States,* 793 F.2d 376, 379 (D.C. Cir. 1986). Rather, this policy addresses a particular course of conduct by a motor carrier consisting of:

> (1) [N]egotiating a rate; (2) agreeing to a rate that the shipper reasonably relies upon as being lawfully filed; (3) failing, either willfully or otherwise, to publish the rate; (4) billing and accepting payment at the negotiated rate for (sometimes) numerous shipments; and (5) then demanding additional payment at higher rates.

*Negotiated Rates II,* 5 I.C.C.2d at 628 n.11. The *Negotiated Rates* policy announces the Commission's general conclusion that when the described course of conduct is established, the carrier will be found to have engaged in an unreasonable practice. And the policy recognizes that an appropriate remedy for such an unreasonable practice is to deny the carrier any recovery of tariff charges above and beyond the negotiated rate. As such, we believe that the *Negotiated Rates* policy represents a reasonable effort, by the agency that Congress charged with the responsibility for administering the Act, to reconcile the competing directives to foster competition while at the same time preventing discrimination between shippers.[16] See *Commercial Metals Co.,* 456 U.S. at 352 ("The remedies for a carrier's violation of the regulations are best left to the ICC for such resolution as it thinks proper."); *Maislin,* 879 F.2d at 405; *Seaboard System R.R.* v. *United States,* 794 F.2d 635, 638 (11th Cir. 1986).

*Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.,* 476 U.S. 409 (1986), does not require a different result. In that case, the Court held that the policies expressed in the 1980 Act were not sufficient to justify overruling this Court's decision in

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[16] Because the Commission has not had the opportunity to rule on petitioner's unreasonable-practice claim in this case, we take no position on whether Caravan's practices in this case were unreasonable. We do believe, however, that the allegations furnished a sufficient basis for referral. See Spiritas Afft. 2-4 (petitioner's president); Newbold Afft. 2-3 (Caravan's former vice-president); Moore Afft. 2-3 (Caravan's former chairman) (all describing negotiation of rates between the parties and the grounds for petitioner's reliance on them).

*Keogh* v. *Chicago & Northwestern Ry.*, 260 U.S. 156 (1922), which had precluded antitrust treble damages actions based on tariff rates filed under an ICC-approved agreement. *Square D* relied heavily on principles of stare decisis (476 U.S. at 424); the Court reasoned that Congress was presumed to be aware of the *Keogh* rule in revising the statute, but had not expressly rejected its holding. But, in our view, that consideration does not constrain the *Commission*'s power to reinterpret or to change the manner in which it implements its governing statute. Indeed, the Commission would be remiss if it failed to revisit its past views to take account of Congress's articulation in 1980 of a new pro-competition policy in regulating motor carriers.[17]

In our judgment, the ICC's *Negotiated Rates* policy reflects an appropriate exercise of the ICC's authority under the reasonable-practice provision (49 U.S.C. 10701(a)). Because issues of reasonableness require referral to the ICC under the primary jurisdiction doctrine, *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U.S. at 291, the district court in this case should have referred the unreasonable practice issue to the ICC for its initial determination, while retaining jurisdiction to review that determination when the matter is returned to court. *Pennsylvania R.R.* v. *United States*, 363 U.S. 202, 205 (1960); *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc., supra.*

b. The court of appeals suggested another reason, which it also derived from the filed rate doctrine, for refusing to refer petitioner's unreasonable-practice claim to the ICC: even if the ICC is willing to hear petitioner's claim, "[a] shipper that pleads unreasonableness as a defense cannot prevent enforcement of

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[17] The court of appeals also erroneously believed that this case presents an "even more persuasive case for deference" than *Square D* because the 1980 Act "creates an *exemption* from filing requirements for contract carriers," but did not do so for common carriers (Pet. App. B7). The court's statement, however, is incorrect: Congress did not add a new exemption for contract carriers in the 1980 Act. The Commission was given authority to exempt contract carriers from filing tariffs in the Motor Carrier Act of 1935, ch. 498, § 218, 49 Stat. 561 (codified at 49 U.S.C. 10702(b) and 10761(b)). The 1980 Act did not alter that authority. See *Central & Southern Motor Freight Tariff Ass'n* v. *United States*, 757 F.2d at 305-306.

the filed tariff doctrine or force the district court to stay proceedings and refer the case to the Commission." Pet. App. B9 & n.6 (citing *Southern Pacific Transportation Co.* v. *San Antonio*, 748 F.2d 266, 274 (5th Cir. 1984)). In other words, in the court of appeals' view, even if the ICC would have authority to declare respondent's actions an unreasonable practice, the filed rate doctrine would preclude a court from staying respondent's action to collect the full tariff charges pending resolution of the unreasonable-practices claim by the Commission.

We agree that, as a general matter, when disputes arise over the reasonableness of applying a tariff rate or provision the shipper must pay the asserted tariff rate, then contest its reasonableness in a separate reparations proceeding before the Commission. See *Pennsylvania R.R.* v. *International Coal Mining Co.*, 230 U.S. 184, 197 (1913); *Arizona Grocery Co.*, 284 U.S. at 384; *San Antonio*, 748 F.2d at 274. There are two reasons in the usual case for declining to stay a carrier's undercharge action. First, the carrier has an interest in prompt payment of a properly filed rate. Second, the shipper has an adequate remedy in reparations proceedings if the rate is subsequently found to be unreasonable, see 49 U.S.C. 11701(b) (1982 & Supp. V 1987). Compare *Burlington Northern Inc.* v. *United States*, 459 U.S. 131, 142 (1982).

Those considerations, however, have little application in the circumstances envisioned by *Negotiated Rates*. In the typical case governed by the ICC's policy, the motor carrier is insolvent and hence is unable to satisfy any subsequent reparations order. In these circumstances, enforcement of the filed tariff without referral to the ICC would effectively nullify the reasonableness requirement of the statute: it would undermine the ICC's meaningful exercise of its unreasonable-practice jurisdiction and deny the shiper an adequate remedy. The carrier, in contrast, can assert no offsetting equity in insisting upon prompt payment when the collection of the rates may entail an unreasonable practice and the carrier is not prepared later to reimburse the shipper. The carrier simply has no right to collect

rates or to engage in practices that the ICC finds are unlawful. Compare *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. at 520; *Pennsylvania R.R.* v. *United States*, 363 U.S. 202, 205 (1960). In this limited situation, therefore, where the ICC has determined to accept referrals in the midst of a collection action, a court should stay judicial proceedings pending referral of the unreasonable practice charge to the Commission. Compare *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc., supra*; *Carriers Traffic Serv., Inc.* v. *Anderson, Clayton & Co.*, 881 F.2d 475 (7th Cir. 1989) (approving referral of an unreasonable-notation claim to the ICC); *Western Transp. Co.* v. *Wilson & Co.*, 682 F.2d 1227, 1231-1232 (7th Cir. 1982). See also *Burlington Northern Inc.* v. *United States*, 459 U.S. at 142 (structuring court review of ICC determinations to preserve the ICC's primary jurisdiction and to protect parties unable to benefit from later reparations proceedings).[18]

3. We believe that the validity of the ICC's *Negotiated Rates* policy is an issue meriting review by this Court. There is a conflict among the circuits on the issue of whether the primary jurisdiction doctrine requires referral of a *Negotiated Rates*

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[18] The referral of unreasonable practice claims by a court to the Commission is clearly appropriate even though there is some uncertainty about whether a shipper could obtain reparations for an unreasonable practice in an action originally filed with the Commission, see U.S. ~~Amicus~~ Br. in Maislin at 11-12. In *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464 (1959), the Court held that the Motor Carrier Act of 1935 did not provide a mechanism for either the courts or the Commission to award reparations based on *past* unreasonable tariff rates. In 1965, Congress overruled *T.I.M.E.* and provided an express right for shippers to recover reparations from carriers based on charges found by the Commission to be unreasonable. Act of Sept. 6, 1965, Pub. L. No. 89-170, §§ 6-7, 79 Stat. 651-652; H.R. Rep. No. 253, 89th Cong., 1st Sess. 12-13 (1965). Courts and the Commission have interpreted this legislation to require a shipper to seek reparations in court, whereupon the court refers to the Commission the issue of reasonableness. See *United States* v. *Associated Transp., Inc.*, 505 F.2d 366, 368-369 (D.C. Cir. 1974); *Informal Procedure for Determining Motor Carrier and Freight Forwarder Reparation*, 335 I.C.C. 403 (1969). Even before the 1965 legislation, however, the Court had limited *T.I.M.E.* to *rate*-reasonableness determinations; a claim of past unreasonable *practices* could be maintained and required referral to the Commission. *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc., supra* (misrouting claim).

claim to the ICC. Compare Pet. App. B13 with *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc., supra; INF, Ltd.* v. *Spectro Alloys Corp.*, 881 F.2d 546 (8th Cir. 1989).[19] The petitions in both this case and *Maislin* present the question whether the ICC's *Negotiated Rates* policy statement is compatible with the filed rate doctrine. Nevertheless, we believe that *Maislin* may provide a preferable vehicle for review by this Court. The district court in *Maislin* granted referral, and, as a result, the ICC applied its *Negotiated Rates* policy in a concrete setting and determined that enforcement of the full tariff charges would constitute an unreasonable practice. In this case, in contrast, the court refused to refer the matter to the Commission, and thus the Court would be deprived of the views of the ICC as to whether the carrier's conduct was or was not unreasonable.

The remaining consideration is whether the Court should await further analysis of the *Negotiated Rates* issues by the lower courts. Although there is now a circuit conflict on the primary jurisdiction question, only one court of appeals has actually reviewed an ICC decision promulgated under the ICC's new policy. *Maislin, supra.* Moreover, no court of appeals has examined the ICC's clarification of its views in *Negotiated Rates II.* Nevertheless, we believe that the legal issues have been adequately ventilated and that lower courts would benefit considerably from this Court's prompt review of the issue. Nearly

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[19] *Negotiated Rates II* permits a shipper to proceed directly to the Commission, without requiring a court referral. Nevertheless, we believe that the conflict remains of practical importance. A shipper's direct filing with the ICC does not guarantee that Commission will be able to act before a carrier reduces its claim to judgment. A direct filing with the Commission may also bifurcate judicial review of the ICC's order from the undercharge action. Cf. *Pennsylvania R.R.* v. *United States*, 363 U.S. at 205-206; *ICC* v. *Atlantic Coast Line R.R., supra.* This Court has previously expressed its preference for a court to refer an unreasonable practice claim to the Commission in a similar setting. *Hewitt-Robins*, 371 U.S. at 85 n.*. See also 28 U.S.C. 1336(b).

every circuit has a pending case regarding the application of *Negotiated Rates*.[20] The issue has also provoked inconsistent decisions from the district courts. Compare Pet. App. G7-G9 (granting referral) with Pet. App. H1-H5 (denying referral). The ICC informs us that it has received 117 *Negotiated Rates* cases on referral from courts, and 80 cases filed directly with the agency. We believe that the significance of the ICC's policy in the development of the filed rate doctrine, together with the volume of litigation pending in the lower courts, makes it appropriate for this Court to review the issue in *Maislin* at this time.

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[20] See *Transtop, Inc.* v. *Delta Traffic Service*, No. 89-1662 (1st Cir. argued Nov. 7, 1989) (referral denied); *Delta Traffic Serv.* v. *Appco Paper & Plastics Corp.*, No. 89-9057 (2d Cir. argued Nov. 16, 1989) (referral denied); *Branch Motor Express* v. *Caloric Corp.*, No. 89-1130 (3d Cir. argued June 27, 1989) (referral granted); *Cooper* v. *Delaware Valley Shippers Ass'n*, No. 89-3259 (4th Cir. argued Dec. 7, 1989) (referral granted in some cases and denied in others); *Orr* v. *Sewell Plastics, Inc.*, No. 89-5108 (6th Cir. argued Nov. 13, 1989) (referral granted); *Orscheln Bros. Truck Lines, Inc.* v. *Zenith Elec. Corp.*, No. 89-1329 (7th Cir. docketed Feb. 17, 1989) (referral denied); *West Coast Truck Lines* v. *Weyerhaeuser Co.*, No. 89-35115 (9th Cir. argued Oct. 3, 1989) (referral granted); and *Feldspar Trucking Co.* v. *Greater Atlanta Shippers Ass'n*, No. 89-8450 (11th Cir. docketed June 9, 1989) (referral denied).

## CONCLUSION

The petition for a writ of certiorari should be held and disposed of in accordance with the disposition of the petition filed in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, No. 89-624.

Respectfully submitted.

KENNETH W. STARR
*Solicitor General*

THOMAS W. MERRILL
*Deputy Solicitor General*

MICHAEL R. DREEBEN
*Assistant to the Solicitor General*

ROBERT S. BURK
*General Counsel*

ELLEN D. HANSON
*Associate General Counsel*

CECELIA E. HIGGINS
*Attorney*
*Interstate Commerce Commission*

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In The

# Supreme Court of the United States

October Term, 1989

SUPREME BEEF PROCESSORS, INC.,
*Petitioner,*

v.

ROBERT YAQUINTO, JR.,
TRUSTEE FOR CARAVAN REFRIGERATED CARGO, INC.,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## PETITIONER'S REPLY BRIEF
## IN RESPONSE TO BRIEF FOR THE UNITED STATES

JOHN W. BRYANT
*Counsel of Record*
NEILL T. RIDDELL

EAMES, WILCOX, MASTEJ AND BRYANT
900 Guardian Building
Detroit, Michigan 48226
Telephone: (313) 963-3750

*Counsel for Petitioner*

Dated: December, 1989

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

## TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES . . . . . 1

ARGUMENT . . . . . 1

CONCLUSION . . . . . 3

## TABLE OF AUTHORITIES

*Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 879 F.2d 400 (8th Cir. 1989) . . . . . 1, 2, 3

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## PETITIONER'S REPLY BRIEF
### IN RESPONSE TO BRIEF FOR THE UNITED STATES

### ARGUMENT

Petitioner agrees with the Solicitor General's recommendation that this Court resolve the conflict between the Fifth Circuit opinion below and the opinion of the Eighth Circuit in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 879 F.2d 400 (8th Cir., 1989), petition for cert. pending, No. 89-624. If the Court grants certiorari in *Maislin*, however, Petitioner does not agree with the Solicitor General's suggestion that the instant case be held in abeyance pending disposition of *Maislin*. Certiorari also should be granted in the instant case even in that event and the two cases should be consolidated for oral argument.

The instant case comes before the Court following the refusal of lower courts to grant Petitioner's[1] request for referral of its unreasonable practice defenses to the Interstate Commerce Commission (ICC). This is by far the most common procedural setting in which lower courts have challenged or ignored the ICC's primary jurisdiction over unreasonable practice defenses in the negotiated rates context. Of the minority of reported cases which have rejected such ICC jurisdiction, 74 percent, including four of the six such cases decided or pending in the Courts of Appeal, involve declinations of referral as opposed to rejections of ICC decisions after referral.[2] *Maislin* does not involve this situation, arising rather in the context of an affirmance of ICC findings after court referral.

Failure to include the instant case in the Court's consideration of the negotiated rates issue potentially could leave unresolved the extent of lower courts' obligation to refer unreasonable practice defenses to the ICC. If after review the Court was to issue a decision confined solely to the affirmance of *Maislin*, such a decision might be interpreted merely as confirming the ICC's powers to rule on unreasonable practice issues. It would not constitute a specific review of holdings by courts such as those below that referral of unreasonable practice defenses is not "mandatory" or would "merely delay" resolution of court proceedings. Pet. App. E-2, F-1. Affirmance of *Maislin* alone also would not address the position of courts such as the Fifth Circuit that

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[1] The Brief for the United States at page 2 contains what Petitioner is advised to be an inadvertent misstatement that referral was requested by the motor carrier, Caravan, rather than by Petitioner. As indicated in the decisions below, Petitioner was the party requesting referral. (Pet. App., E-1, F-1)

[2] Based upon updated listings set forth in appendices F and H to Petition in No. 89-624 and Brief for the United States at 18 (n. 20).

shippers are required to pay freight charges even during the ICC's determination of their lawfulness on referral, as discussed at pages 14-16 of the United States Brief. Petitioner submits that it would be preferable for the Court to address these issues in its core opinion rather than reserving its specific findings for a subsequent *per curiam* order in this case in the event of an affirmance in *Maislin*.

## CONCLUSION

The Court should grant the petition for a writ of certiorari in this case, either separately or through consolidation for oral argument with *Maislin* under Rule 37.3 or, at minimum, hold the petition to be disposed of in accordance with the disposition of the Petition in *Maislin* as suggested by the Brief for the United States.

Respectfully submitted,

By: /s/ JOHN W. BRYANT
*Counsel of Record*

/s/ NEILL T. RIDDELL

EAMES, WILCOX, MASTEJ AND BRYANT
900 Guardian Building
Detroit, Michigan 48226
Telephone: (313) 963-3750

*Counsel for Petitioner*

Dated: December, 1989